GOVERNMENT OF MALAYSIA

v.

LIM KIT SIANG & ANOTHER CASE

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
ABDUL HAMID OMAR CJ (MALAYA)
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
EUSOFFE ABDOOLCADER SCJ
[CIVIL APPEAL NO. 434 & NO. 456 OF 1987]
15 MARCH 1988

CIVIL PROCEDURE: *Injunction - Respondent is Leader of Opposition - Proposed privatisation contract for construction of North-South Highway - Contract to be signed between UEM and Government of Malaysia pursuant to Letter of Intent - Declaration sought letter of Intent issued by Government to UEM was invalid - Permanent injunction sought to restrain UEM from signing contract with Government - Whether injunction sought against officer of Government - Section 29 Government Proceedings Act 1956.*

CIVIL PROCEDURE: *Locus Standi - Whether respondent has locus standi to bring and maintain suit against Government - Cause of action - Whether can maintain suit against UEM.*

CIVIL PROCEDURE: *Jurisdition - Supreme Court - Oral Judgment of Supreme Court - Interlocutory injunction granted by Supreme Court - Whether provisional or final Judgment - Power of Supreme Court - Whether Order of Supreme Court can be discharged or varied by another panel of same Court.*

This was an appeal against the decision of V.C. George J ([1987] CLJ (Rep) 722) who dismissed the applications of United Engineers (M) Bhd. (UEM) and the Government of Malaysia to have the interim injunction granted on 25 August 1987 by the Supreme Court ([1987] CLJ (Rep) 170) set aside and the suits struck out on the ground that they disclosed no reasonable cause of action and also for lack of *locus standi* in addition to being frivolous, vexatious and an abuse of the process of Court. Hence, this appeal to the Supreme Court for the second time.

Held:

[1] On going through the respondent's statement of claim the Court found nothing in it which shows the evidence of a factual situation. The respondent has no legal relationship with UEM which would indicate the existence of any legal right or duty in the relationship between them. Therefore the respondent's suit against UEM is unmaintainable and its application to strike it out should therefore be granted and consequently its appeal should be allowed.

[2] Since the suit against UEM is not maintainable there was no question of the respondent's entitlement to a remedy of declaration and injunction permanent or otherwise. The interim injunction which was granted against UEM has no legal basis. Also the issue of the interim injunction against UEM is absolutely contrary to the expressed words of **s. 29 of the Government Proceedings Act 1956** as it has in effect indirectly restrained the Government.

[3] In this case, not only has the respondent no cause of action against UEM but the Court also has no power to issue the injunction interim or otherwise. The respondent's suit against UEM is therefore unmaintainable as it is also vexatious, frivolous and constitutes an abuse

of the judicial process.

[4] There is nothing in the Constitution or in the Government Contracts Act which imposes a legal duty on the Government to consult and accept the views of any taxpayer or group of taxpayers or to hear objections. However, there may be moral and political obligations on the part of the Government to be mindful of taxpayers' objections but this is not a basis for the Court to find a legal duty giving any taxpayer *locus standi* to maintain this suit as such moral obligations should be addressed at other forums.

[5] The wording and tenor of the short oral Judgment of the Supreme Court delivered on 25 August 1987 clearly show that the Court did not consider its ruling to be a definitive or conclusive one. Thus the decision could only be no more than a provisional or *prima facie* one as this is confirmed by a proviso in the oral Judgment itself which states that UEM and the Government were "at liberty to apply". Hence the Court cannot see any thing in the oral Judgment which inhibits the Court from considering the problem of *locus standi* again.

[6] In the circumstances, the appeals were allowed and it was ordered that the suits against the Government and UEM be dismissed and the interim injunction discharged.

[Appeal allowed. Suits against Government and UEM dismissed. Interim injunction discharged. Deposit paid by UEM refunded. Each party to bear its own costs.]

Cases referred to:

Letang v. Cooper [1965] 1 QB 232
Regina v. Secretary of State for the Home Department & Anor., ex parte Herbage [1987] 1 QB 872
Boyce v. Paddington Borough Council [1903] 1 Ch 109
Gouriet v. Union of Post Office Workers & Ors. [1977] 3 All ER 70
Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 2 WLR 983
Blackburn v. AG [1971] 1 WLR 1037
AG (on the relation of McWhirter) v. Independent Broadcasting Authority [1973] All ER 689 [1973] QB 629
Regina v. GLC ex parte Blackburn & Anor. [1976] 1 WLR 558
Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617
Regina v. HM Treasury ex parte Smedley [1985] 1 All ER 589
Regina v. Metropolitan Police Commissioner ex parte Blackburn [1980] TLR 13
Regina v. Greater London Council ex parte Blackburn & Anor. [1976] 1 WLR 558
Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148
Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177
Dyson v. AG [1911] 1 KB 410
Baker v. Carr 369 US 180 [1961]
Gouriet v. Union of Post Office Workers Ors. [1978] AC 435
Williams v. Fawcett [1986] 1 QB 604
Young v. Bristol Aeroplane Co. Ltd. [1944] KB 718; [1946] AC 163
Morelle Ltd. v. Wakeling [1955] 2 QB 379
Attorney-General for Ontario v. Canada Temperance Federation [1946] AC 193
Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29
Othman Saat v. Mohd. bin Ismail [1982] 1 MLJ 177
O'Reilly v. Mackman [1983] 2 AC 237
Great Western Railway Co. v. Owners of S.S. Mostyn [1927] AC 73
Practice Statement (Judicial Precedent) [1966] 1 WLR 1234
The Bengal Immunity Company Limited v. The State of Bihar & Ors. [1955] 2 SCR 603

PP v. Ooi Khai Chin & Anor. [1979] 1 MLJ 112
PP v. Tai Chai Geok [1978] 1 MLJ 166
IRC v. Federation of Self Employed [1982] AC 617; [1981] 2 All ER 93
Australian Conservation Foundation v. Commonwealth of Australia [1979-80] 28 ALR 257
Amalgamated Society of Railway Servants v. Osborne [1910] AC 87
Morris v. Burdett [1813] 105 ER 361
Datuk Ong Kee Hui v. Sinyium anak Mutit [1983] 1 MLJ 37
Dato Menteri Othman bin Baginda & Anor. v. Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29
Chief Constable of North Wales Police v. Evans [1982] 3 All ER 141
Duke v. Reliance Systems Ltd. [1987] 2 WLR 1125
WEA Records Ltd v. Visions Channel 4 Ltd. & Ors. [1983] 2 All ER 589
Guaranty Trust Co. of New York v. Hannay [1915] 2 KB 536
Gillick v. West Norfolk and Wisbech Area Health Authority & Anor. [1986] 1 AC 112
Regina v. Horsham Justices, ex parte Farquharson & Anor. [1982] 2 WLR 430
Regina v. Felixstowe Justices, ex parte Leigh & Anor. [1987] 1 QB 582
Fitzgerald v. Muldoon [1976] 2 NZLR 615
Regina v. Hereford Corporation, ex parte Harrower [1970] 1 WLR 1424
Waddell v. Schreyer [1981] 126 DLR (3d) 431
Finlay v. Minister of Finance of Canada [1984] 1 FC 516
Finlay v. Canada [1986] 2 SCR 607
Thorson v. Attorney-General for Canada [1975] 1 SCR 138
Nova Scotia Board of Censors v. McNeil [1976] 2 SCR 265
Minister of Justice for Canada v. Borowski [1981] 2 SCR 575
Lye Thai Sang & Anor. v. Faber Merlin (M) Sdn. Bhd. & Ors. [1985] CLJ (Rep) 196
Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors. [1985] CLJ (Rep) 122
Viro v. Regina [1978] 141 CLR 88
Jones v. The Commonwealth [1987] 61 ALJR 348
Spycatcher Case (Attorney-General v. Guardian Newspapers Ltd. & Ors. [1987] 1 WLR 1248
Loudon v. Ryder (No. 2) [1953] Ch 423
R.J. Reuter Co. Ltd. v. Mulhens [1954] Ch 1950
Kingdom of Spain v. Christie, Manson & Woods Ltd. [1986] 1 WLR 1120
Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong [1970] AC 1136
Campbell College, Belfast (Governors) v. Commissioner of Valuation for Northern Ireland [1964] 1 WLR 912
Trustees of Clyde Navigation v. Laird [1883] 8 AC 658
Assheton Smith v. Owen [1906] 1 Ch 179
Pole-Carew v. Craddock [1920] 3 KB 109
Attorney-General v. The Edison Telephone Company of London [1880] 6 QBD 244
S & F International Limited v. Trans-Con Engineering Sdn. Bhd. [1985] 1 MLJ 62
Additional District Magistrate, Jabalpur v. Shivakant Shukla [1976] AIR SC 1207

Legislation referred to:
Civil Law Act 1956, s. 3
Courts of Judicature Act 1964, s. 44(1), (3).
Crown Proceedings Act 1947 [UK], ss. 21, (2), 38(2)
Emergency (Essential Powers) Ordinance No. 22, 1970, s. 2
Federal Constitution, arts. 68(1), 145(2)
Government Contracts Act 1949, s. 2.
Government Proceedings Act 1956, ss. 2(2), 7, 29, (1)(a)
Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19
Specific Relief Act 1950, ss. 6, 41, 51, 54(d), (k)
Supreme Court Act 1981 [UK], s. 31, (3)

Rules of the Supreme Court 1883 [UK], O. 25 r. 5, O. 53 rr. 3(7), (5)

Other sources referred to:
Judicial Review Law and Procedure, R.J.F. Gordon, p. 51, para. 4-7
Annual Practice, 1985, p. 767, para. 53/1-14/47

For the appellant (SCCA 434/87) - Abu Talib Othman, Attorney-General, Malaysia (T. Selventhiranathan, SFC with him)
For the appellant (SCCA 456/87) - R.R. Chelliah (Zaid Ibrahim & C.P. Mahendran with him); M/s. Zaid Ibrahim & Co.
For the respondent (in both Appeals) - On 12 January 1988 - T. Thomas (K.C. Cheah, N. Shanmugam & C.G. Oh with him); On 14 & 15 January 1988 - Karpal Singh (K.C. Cheah, N. Shanmugam & C.G. Oh with him); M/s. Karpal Singh & Co.

JUDGMENT

Salleh Abas LP:

The respondent who is the Leader of Opposition is seeking the aid of the Court to Interfere in the affairs of a proposed privatisation contract for the construction of North and South Highway due to be signed between the United Engineers (M) Bhd. (UEM), (appellant in appeal No. 456/1987) and the Government of Malaysia, (appellant in appeal No. 434/1987) by asking for a declaration that the letter of intent issued by the Government to UEM in respect of the North and South Highway (NSH) contract is invalid and based on the premise he also prays for a permanent injunction to restrain UEM from signing it with the Government .

On 18 August 1987 he filed a suit to that effect at Penang High Court and on the same day applied by way of an *ex parte* Summons-in-Chambers for an interim injunction against UEM to restrain it from signing the NSH contract. The application was heard by Edgar Joseph Jr. J. He refused the application but on appeal to the Supreme Court (Tan Sri Lee Hun Hoe CJ Borneo, Wan Suleiman and Wan Hamzah) the Court ordered the interim injunction to be issued "with liberty to apply" and at the same time directed an early trial of the suits.

Soon after this UEM and the Government applied to the High Court to have the interim injunction set aside and the suits struck out on the ground that they disclosed no reasonable cause of action and also for lack of *locus standi*, in addition to being frivolous, vexatious and an abuse of Court's process. These two applications were heard together by V.C. George J and in a long written judgment the learned Judge dismissed them. Thus the suits and the interim injunction stayed on and so both UEM and the Government appeal to the Supreme Court and hence the case once again came to this Court for the second time.

Confusing as these appeals may appear to be, my decision should centre only on the following questions:

(a) whether the respondent/plaintiff has a cause of action to maintain a suit against the United Engineers;

(b) whether his application for an injunctive remedy is not contrary to s. 29 of the Government Proceedings Act;

(c) whether he has *locus standi*, i.e., title to bring and maintain the suit against the Government;

(d) whether the oral judgment of the Supreme Court delivered on 25 August 1987 was a final one; and

(e) even if he has *locus standi*, whether his complaint is one in respect of which the Court's

discretion to grant or refuse the remedy of declaration should be exercised in is favour.

(a) ***Cause of Action***

The first issue is whether or not the respondent's statement of claim discloses any cause of action at all in order to enable him to maintain the suit against UEM. If it does not, the application by UEM to strike out the suit and consequently its appeal should both be allowed.

What then is the meaning of "a cause of action"? "A cause of action" is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at 242 defined "a cause of action" to mean "a factual situation, the existence of which entitles one person to obtain from the Court a remedy against another person". In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that first the responden /plaintiff has a right either at law or by statute and that secondly such right has been affected or prejudicated by the appellant/defendant's act.

Going through the respondent's statement of claim I found nothing in its which shows the existence of such factual situation. The respondent has no legal relationship with UEM, which would indicate the existence of any legal right or duty in the relation between them. He is a complete stranger to the Company. It is not shown that the respondent is a shareholder or has any interest, directly or indirectly, in the running of the affairs of UEM nor has UEM done any wrong to the respondent or deprived or threatened to deprive him of his right and privilege. The entitling factual situation simply does not exist. Therefore, the respondent's suit against UEM is unmaintainable and its application to strike it out should therefore be granted and consequently its appeal be allowed.

(b) ***Application for injunctive remedy***

Since the suit against UEM is not maintainable there is therefore no question of the respondents's entitlement to a remedy of declaration and injunction, permanent or otherwise. The interim injunction, which was granted against UEM has no legal basis.

Apart from this, the issue of the interim injunction against UEM is absolutely contrary to the expressed words of s. 29 of the Government Proceedings Ordinance 1956, as it has in effect indirectly restrained the Government. Section 29 is as follows:

> 29(1) In any civil proceeding by or against the Government the Court shall .... have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
>
> (a) where in any proceedings against the Government ... the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) ...
>
> (2) The Court shall not in **any** civil proceedings grant any injunction ... if the effect of granting the injunction ... would be to give any relief against the Government which could not have been obtained in **proceedings against the Government**".
> (Emphasis is mine)

This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the Court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of restraining the Government or its officers

from performing their functions. This has been the interpretation which has been placed by the Courts in England as well as in this Country.

However, this interpretation has recently been questioned by Hodgson J in *Regina v. Secretary of State for the Home Department & Anor., ex parte Herbage* [1987] 1 QB 872. I do not consider this case as having much bearing upon the powers of the Court in Malaysia relating to the granting of injunction against the Government or its servants. The effects of Hodgson J's decision is that although s. 21 of the UK Crown Proceedings Act 1947 does not apply to proceedings on the Crown side of the QB Division, and therefore the Crown's immunity from injunction is not claimable under s. 21, nevertheless O. 53, which is backed by s. 31 of the Supreme Court Act 1981 gives jurisdiction to the Court to grant injunction, even interim injunction against a servant of the Crown, even though proceedings may have been commenced on the Crown side of the QB Division. But in Malaysia we have no O. 53 and s. 31. Is it justified for us to import this decision which is only a High Court decision to depart from the generally accepted interpretation of s. 29 of the Government Proceedings Act? With respect I am unable to agree.

Looking at the statement of claim of the respondent against both the Government and UEM, I cannot help thinking that the suit against UEM is commenced purely as a ground or a stepping stone for the purpose of applying for an injunction; more particularly an *ex parte* interim injunction in order to stop the NSH contract. Knowing that no injunction could be obtained directly or indirectly against the Government or its officers because of the proviso (a) to subsection (1) and subsection (2), the scope of the suit is deliberately widened to include UEM as another defendant. In my view the interim injunction should have been refused.

Refusal to grant the injunction in this case is also consistent with paras. (d) and (k) of s. 54 of the Specific Relief Act in that no injunction can be granted "to interfere with the public duties of any department of any Government" nor can it be granted "where the applicant has no personal interest in the matter". Personal interest here must surely mean legal interest and not merely political interest.

In this case since not only has the respondent no cause of action against UEM but the Court also has no power to issue the injunction, interim or otherwise, the respondent's suit against UEM is therefore unmaintainable as it is also vexatious, frivolous and constitutes an abuse of the judicial process.

(c) *Locus standi*

Every legal system has a built-in mechanism to protect its judicial process from abuse by busy-bodies, cranks and other mischief-makers by insisting that a plaintiff should have special interest in the proceedings which he institutes. This special interest is a nexus between him and the party against who he brings his complaints to Court and is known as *locus standi*.

In a public law litigation the rule is that the Attorney-General is the guardian of public interest. It is he who will enforce the performance of public duty and the compliance of public law. Thus when he sues he is not required to show *locus standi*. On the other hand any other person, however public spirited he may be, will not be able to commence such litigation, unless he has a *locus standi*, or in the absence of it, he has obtained the aid or consent of the Attorney-General. If such consent is obtained the suit is called a relator action in which the Attorney-General becomes the plaintiff whilst the private citizen his relator. I will deal with this aspect in the later part of this judgment. In the instant appeal since this is not a

relator action the respondent must show that he has the necessary *locus standi* to commence and maintain the suit.

What is the law on *locus standi*?

A clear statement of it was stated by Buckley J in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 as follows:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damages peculiar to himself from the interference with the public right.

The above passage was accepted by the House of Lords in *Gouriet v. Union of Post Office Workers & Ors.* [1977] 3 All ER 70 (see the speeches of Lord Edmund Davies and Lord Fraser). That was the law of *locus standi* declared by the highest Court in England in 1977. However, six months later the law was changed as a result of a new procedure of judicial review introduced by O. 53 of the UK Supreme Court Rules.

Locus standi is inseparable from, and indeed intertwined with, relator actions because if a private citizen, wishing to complain that a public authority has not legally performed its function or has failed to perform it altogether, has no *locus standi*, he must obtain the consent of the Attorney-General in order to commence a relator action. Without *locus standi* he cannot proceed on his own. In cases where the Attorney-General has given his consent, there is, of course, no problem, because no *locus standi* needs to be shown since the Attorney-General is constitutionally regarded as the guardian of public right. The difficulty arises where the necessary consent is not obtained before a private citizen launches a suit. In a few cases involving matters of general public interest, which were started by a private citizen, the Attorney-General did intervene in the proceedings either by subsequently giving his consent or even by his personal appearance, thereby dispensing with the requirement of *locus standi* of the applicant. Yet there are cases in which he made no such intervention at all. In such cases the applicant must show *locus standi*.

The study of the development of the law on *locus standi* in England is very interesting. During the tenureship of Lord Denning MR, it appears that the Court of Appeal by a spate of judicial activism widened the law on *locus standi* by dispensing with the requirements of private right or private injury caused to the complaining citizen. (See *Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 WLR 983; *Blackburn v. AG* [1971] 1 WLR 1037; *AG (on the relation of McWhirter v. Independent Broadcasting Authority* [1973]) All ER 689 at 698 and [1973] QB 629; and *Regina v. GLC ex parte Blackburn & Anor.* [1976] 1 WLR 558 at 559).

This was the view then prevailing in English Law in the late sixties and seventies until it was rejected by the House of Lords in 1977 in *Gouriet's* case. This case restored the law on *locus standi* to what was formerly stated by Buckley J in *Boyce's* case. However, the restoration was shortlived because six months later a new procedure by way of judicial review which combined applications for the prerogative order of *mandamus, certiorari* and prohibition with application for declaratory and injunctive remedies, was introduced by O. 53 of the United Kingdom Supreme Court Rules.

Under this Order a private citizen making an application for judicial review is required to

show that he has "a sufficient interest in the matter to which his application relates". Thus English Courts are required to interpret what "sufficient interest" means. In most of the cases decided after the introduction of this Order "sufficient interest" has been given a wider meaning than, and a different approach from, that stated in *Boyce's* case. The result is the return towards the liberal stand propounded by Lord Denning in the judgments of the Court of Appeal prior to *Gouriet's* case. This liberalism can be seen in the judgment of the House of Lords in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617, and the Court of Appeal's decisions in *Regina v. HM Treasury ex parte Smedley* [1985] 1 All ER 589; *Regina v. Metropolitan Police Commissioner, ex parte Blackburn* [1980] TLR 13, and *Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 WLR 893.

Necessity seems to be the basis for liberalising the law on *locus standi*. This can be seen clearly from the dicta of Lord Denning in a number of cases before and after *Gouriet's* case was decided. His view, which was later supported by Lord Diplock, is that if a public spirited person, not having any special or peculiar interest in the performance of public duty by a public body, is not given right of hearing to bring the matter before the Court, no one will ever bring it to Court. In other words, it is a necessity, which arises, not because of his private interest being adversely affected, but because of the nature of the complaint and the need for the Court to intervene and to grant remedies. This is epitomised in Lord Denning's question: "Are Courts to stand idly by?"

The seed of this liberalism (more accurately abolition) of *locus standi* first began with a *dictum*, which later germinated into a *ratio decidendi*. The first *dictum* was sown in *Regina v. Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 WLR 893. In this case Lord Denning threw the question open whether a private citizen who applied for a *mandamus* to compel the Commissioner of Police to enforce gaming law had or had no *locus standi*. But he did, however, recognise as shown in the following passage of his judgment, that such citizen had no *locus standi*. This is what he said:

> It is I think an open question whether Mr. Blackburn has a sufficient interest to be protected. No doubt any person who was **adversely affected** by the action of the Commissioner in making a mistaken policy decision would have such an interest. The difficulty is to see how Mr. Blackburn himself has been affected. But without deciding that question, I turn to see whether ... (p. 903)
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> (Emphasis is mine)

Salmon LJ agreed with the above quoted passage, whilst Edmund Davies LJ insisted upon the requirement of special or peculiar interest. In his view a person without such interest had no *locus standi* to enforce the due discharge of the public duty under consideration.

Three years later, in 1971, (*Blackburn v. Attorney-General* [1971] 1 WLR 1037) the same Mr. Blackburn came again to Court challenging the legality of the British Government's proposed entry into the European Common Market, since it was argued, the signing of the European Common Market Treaty would compromise the British Parliamentary sovereignty. The Court rejected this argument because it held that it could not impugn the treaty-making power of the Crown. However, during the course of his judgment Lord Denning MR expressed an *obiter dictum* saying that he would not rule Mr. Blackburn out on the ground that he had no standing.

The next case in which Lord Denning expressed an *obiter* is *Attorney-General (on the*

relation of McWhirter) v. Independent Broadcasting Authority [1973] 1 All ER 689 at 698 [1973] QB 629 at 649. In this case he said:

> In the light of all this I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly of unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the Court itself. He can apply for a declaration and, in a proper case, for an injunction, joining the Attorney-General if need be, as defendant. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizens of this country; so that they can see that those great powers and influence are exercised in accordance with law. I would not restrict the circumstances in which an individual may be held to have a sufficient interest. Take the recent cases when Raymond Blackburn applied to the Court on the ground that the Commissioner of Police was not doing his duty in regard to gaming or pornography. Blackburn had a sufficient interest, even though it was shared with thousands of others. I doubt whether the Attorney-General would have given him leave to use his name: see *Regina. v. Metropolitan Police Commissioner, ex parte Blackburn* [1968] 1 All ER at 770, 771, [1968] 2 QB 137, 138, 139.

This passage was held by the House of Lords in *Gouriet's* case to be only an *obiter* (see *Gouriet's* case [1977] 3 All ER p. 76 at 85, 95, 100, 106, 117).

In another *Blackburn* case *Regina v. Greater London Council ex parte Blackburn & Anor.* [1976] 1 WLR 558 the same private citizen and another applied to the Court for a prerogative order of prohibition directing the respondent, Greater London Council, not to allow the showing of obscene films as they had bad influences on children. The Court of Appeal held that the applicants as citizens, ratepayer and parents residing within the Council's jurisdiction had sufficient *locus standi* to make the application. Thus what was formerly an *obiter,* then became a *ratio decidedi*. In his judgment Lord Denning said:

> It was suggested that Blackburn has no sufficient interest to bring these proceedings against the GLC. It is a point which was taken against him by the Commissioner of Police .... On this point, I would ask: Who then can bring proceedings when a public authority is guilty of a misuse of power? Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has. I think he comes within the principle which I stated in *McWhirter's* case [1973] QB 629, 649, which I would recast today so as to read:
>
> > I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the Courts of law and seek to have the law enforced, and the Courts in their discretion can grant whatever remedy is appropriate". (p. 558-559).

Those were the cases decided by the Court of Appeal before the House of Lords' decision in *Gouriet's* case. In those cases the Court of Appeal simply passed over the requirement of *locus standi* and went straight to the crux of the complaints of the applicants. Before the introduction of the new procedure of judicial review under O. 53 this approach was not accepted by the House of Lords and the law, according to the House, was the same as formerly laid down by Buckley J in *Boyce's* case.

However, with the introduction of the new procedure, not only *locus standi* ceased to be a threshold requirement, its meaning also becomes liberated by the use of the words "sufficient interest" and consequently relator action ceases to have much meaning. The result is that

both the approach to the problem of *locus standi* and its meaning advocated by Lord Denning were finally accepted by legislation.

Order 53 was based largely on the recommendation of the Law Commission made in their Report on Remedies in Administrative Law (Law Com. No. 63 Commd. 6407 [1976]). It came into force in January 1978. Subsequently the Order was given a statutory backing by s. 31 of the Supreme Court Act 1981.

For the purpose of explaining this change it is necessary to refer to three cases of judicial review under O. 53 in which *locus standi* becomes liberated. First *Regina v. Metropolitan Police Commissioner ex parte Blackburn* (Times Law Reports 7 March 1980), secondly *Regina v. Economic Secretary to the Treasury ex parte Smedley* (Times Law Reports 8 December 1984), Queen's Bench Division, and [1985] 1 All ER 589 (Court of Appeal) and thirdly *Regina v. Inland Revenue Commissioners ex parte Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.

In the first case - this is the fourth *Blackburn's* case - the applicant made an application requiring the Metropolitan Police Commissioner to take action against a widespread exhibition of pornographic materials. Even the Temple tube station, which is the station used by legal fraternity was not spared from such daring exhibition. The application was refused by the Divisional Court and on appeal to the Court of Appeal the application was similarly dismissed and leave to appeal to the House of Lords was also refused. The reason for dismissing the appeal was not based on *Locus standi*, but on merits in that it was held that it is not for Blackburn nor for the Court to tell the Commissioner how he was to perform his duties. All the Judges of the Court of Appeal agreed that Blackburn, the applicant, had "a sufficient interest in the matter to which his application related" within the meaning of O. 53, r. 3(5). This case ended at the level of the Court of Appeal only.

The House of Lords had its first opportunity to decide the issue of *locus standi* as a requirement for judicial review under O. 53 in the *Federation of Self-Employed's* case.

This was a case in which the Federation contested the legality of Inland Revenue's decision to give tax amnesty to casual workers of Fleet Street on the ground that it was difficult to collect the tax from them. A preliminary objection was taken on behalf on the Inland Revenue to the effect that the Federation had no *locus standi* or a sufficient interest to apply for a judicial review relating to the legality of tax amnesty. The Divisional Court upheld the objection but the Court of Appeal overruled that decision and held that a body of taxpayers represented by the Federation could reasonably assert that they had a genuine grievance in the alleged failure of the Inland Revenue to do its duty in the granting of an unlawful indulgence of tax amnesty to the casual workers. The House of Lords held that the question of sufficiency of interest was no longer a threshold requirement under O. 53. The House further held that the question must be determined on the basis of the available evidence before the Court. Although the House agreed with the Court of Appeal that the Federation had the necessary *locus standi* it refused the judicial review on the ground that the giving of tax amnesty is not an illegal act by the Inland Revenue since it is part of its duty of good management and collection of taxes. This case therefore clearly shows that the Court's approach to the problem of *locus standi* under O. 53 has radically changed. Instead of being a threshold requirement, it now becomes one of the matters to be taken into consideration for the exercise of judicial review.

In *Smedley's* case, which went up only as far as the Court of Appeal, a citizen challenged the propriety of the procedure by which the British Government was proposing to pay a

monetary contribution to the European Community in order to fulfil an undertaking made by the representatives of the Government. The Government proposed to follow a procedure of an Order in Council to be approved by both Houses of Parliament, whereas the applicant contended that an Act of Parliament should be passed instead. The application was dismissed by the Queen's Bench Division (Woolf J) not on the ground of lack of *locus standi* but on the ground that it was a matter for Parliament to adjudicate on. As to the *locus standi* Mr. Justice Woolf in the Queen's Bench Division said that:

> he would be surprised if a public spirited citizen was prevented from coming before a Court to prevent an unconstitutional and unauthorized disposal by the Government of funds.
> (The Times L.R. 8 December 1984)

In the Court of Appeal, [1985] 1 All ER 589, it was held that the applicant as a taxpayer had sufficient *locus standi,* to raise this question by way of an application for judicial review, Slade LJ said:

> I do not feel much doubt that Mr. Smedley, if only in his capacity as a taxpayer, has sufficient *locus standi,* to raise this question by way of an application for judicial review; on the present stage of the authority, I cannot think that any such right of challenge belongs to the Attorney General alone.
> ([1985] 1 All ER 589 at 595)

In view of this liberation achieved by the introduction of O. 53 which was later propped up by s. 31 of the Supreme Court Act, the applicants, as both *Blackburn's and Smedley's* cases have shown, if they are private citizens, need not have to proceed by way of relator action making the Attorney-General as the dominant complainant to challenge the legality of an administrative or executive decision, although of course the Court still retains its discretion whether to exercise the judicial review or not. In both *Blackburn & Smedley's* cases, the Court held that the applicant had *locus standi,* but refused the applications because the matters complained of were not within the jurisdiction of the Court to consider. In *Blackburn's* case the applicant requested the Court to tell the Commissioner of Police, London to do his duties whilst in the *Smedley's* case the applicant required the Court to tell the Executive how to proceed to implement its Common Market undertaking.

Back in Malaysia, since we have not accepted O. 53 and its statutory underpinning (i.e., s. 31 of the Supreme Court Act) there is no justification therefore for us to depart from the rule of *locus standi* accepted by the highest Court in England prior to O. 53.

Speaking on the effect of O. 53, Lord Ackner in his Paper presented at the Fourth International Appeal Judges' Conference said:

> Judicial review, certainly in English law, is a growth industry. In the last five years it has increased by over a 100 percent., from 500 applications to over one thousand excluding criminal applications. The leading English textbook on administrative law, written by that distinguished academic well-known in Malaysia, Professor Sir William Wade QC has developed from a slim little volume first published in 1961 to a heavy tome approaching a thousand pages in its 5th Edn. published five years ago, and there is clearly much more to follow in the 6th Edn."

This growth must have been due to the change in the law.

In Malaysia there are two important judgments on *locus standi.* The first is *Lim Cho Hock v. Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148, and the second is *Othman Saat v. Mohamed Ismail* [1982] 2 MLJ 177.

In *Lim Cho Hock's* case the plaintiff was a member of Parliament for the parliamentary constituency of Ipoh as well as a member of the Perak State Legislative Assembly for the

constituency of Kepayang and a ratepayer within the area of Ipoh Municipality. He challenged the legality of the appointment of the Menteri Besar, Perak as President of Ipoh Municipal Council. It was held that as a ratepayer the plaintiff had *locus standi*.

In the, second case, i.e., *Othman Saat's* case, the respondent who was one of 183 applicants for State land felt aggrieved because after waiting for eight years without any response from the State Authority he subsequently learnt to his horror that the land he and others had applied for was alienated to a number of people who did not appear to deserve the land at all, one of whom was the appellant who was then the Menteri Besar of Johore. The Federal Court held that the respondent had *locus standi*. The failure of the State Authority to decide upon his application, the alienation of the land in question to other persons and conversely his expectation that his application would be decided one way or the other and that he would not be kept in suspense for a long time only to learn later that the subject-matter of his application had gone to someone else; all these constituted his standing to commence the proceedings.

In my judgment these two cases represent the high water marks of the law of *locus standi* in Malaysia, beyond which the Court should be careful to tread. Both these cases can be justified on the basis that the plaintiff had a genuine private interest to be furthered and protected.

What is important about *Othman Saat's* case is that part of the judgment which dealt with the approach which the Court should take when confronted with the question of *locus standi*, Here is what the Court said:

> The sensible approach in the matter of *locus standi* in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.

Taking this approach, let us now examine the basis of the respondent's claim on *locus standi*.

First he says he is the leader of the opposition, i.e., a politician. It is common knowledge that a politician works for voters' support. From his statement of claim it appears that the respondent brought up this complaint to court because of his inability to prevent the formation of the NSH contract by political means. The question is: Is he motivated by public spiritedness or by an expectation of political gain and popularity? Would political grievances give him the *locus standi*? In my judgment the Court should be slow to respond to a politically motivated litigation unless the claimant can show that his private rights as a citizen are affected. Similar caution was expressed by Salmon LJ in *Blackburn's* case [1971] saying that he deprecated "litigations the purpose of which is to influence political decisions." Thus as a politician the respondent's remedy in this matter does not lie with the Court, but with Parliament and the electorate.

Next, as a frequent road and highway user, I cannot see how he could be different from other road and highway users. There is nothing to show that he would be prevented from using roads and highways, already constructed or proposed to be constructed. If he objects to the tolls that are to be imposed for using the proposed NSH he has, like any other users, an option either to use the highway or to use old or other roads. Thus, as a road and highway user, he also has no *locus standi*.

I now come to the question whether as a taxpayer the respondent has *locus standi* to bring this suit against the Government. According to *Smedley's* case a taxpayer had *locus standi*,

but that case like many other cases I referred to earlier was decided under the new procedure of judicial review introduced by RSC O. 53 which enlarged the meaning of *locus standi* to "sufficient interest". But we have not adopted this new procedure in our High Court Rules. Therefore the question whether or not the respondent as a taxpayer has *locus standi* to interfere in the NSH contract must, in my judgment, be answered in the negative.

Under Art. 68(1) of the Constitution the Government can make contracts and can sue and be sued. In the making of a contract s. 2 of the Government Contracts Act 1949, ensures that if the contract is reduced to writing it should be made in the name of the Government and signed by a Minister or a public officer authorized by a Minister. There is nothing in the Constitution or in the Government Contracts Act which imposes a legal duty on the Government to consult and accept the views of any taxpayer or group of taxpayers or to hear objections. There may be a moral and political obligation on the part of the Government to be mindful of taxpayers' objection, but this is not a basis for the Court to find a legal duty giving any taxpayer *locus standi* to maintain this suit. Such moral obligation should be addressed at other forums.

Hence I fail to see how the respondent, whether as a politician, a road and highway user or a taxpayer could have *locus standi.*

(d) ***Oral Judgment of the Supreme Court***

This leaves me to say something about the oral judgment of this Court delivered on 25 August 1987. The Attorney-General prefaced his submission by saying that the previous proceedings before this Court were in law still *ex parte* proceedings, being a continuation of proceedings before Edgar Joseph Jr. J because, he said, no appearance by either the Government of UEM had then been filed. Thus, he submitted, the ruling of the Court would only be provisional and therefore not binding and in any event it was only an un-reasoned decision. Karpal Singh on the other hand countered the submission saying that the proceedings were in fact and in law *inter partes* proceedings and the ruling of the Court therefore should stand.

Whatever the merits and demerits of these arguments, in my judgment, the wording and the tenor of this short oral judgment clearly show that the Court did not consider its ruling to be a definitive or conclusive one. In this connection it should be recalled that the matter before the Supreme Court, then only concerned the refusal by Edgar Joseph Jr. J to grant the respondent's application for an *ex parte* interim injunction. The evidence available before the Court was only the respondent's affidavit which in effect is a mere repetition of his statement of claim. The Court then had not the advantage of full arguments as had V.C.George J and us. Thus the decision could, only be no more than a provisional or *prima facie* one. This is confirmed by a proviso in the oral judgment itself which says that UEM and the Government were "at liberty to apply." Presumably "to apply" means to apply to the High Court to set aside the interim injunction. Hence I cannot see anything in the oral judgment which inhibits the Court from considering the problem of *locus standi* again.

(e) ***Judicial Discretion***

So much has been said on issues of lack of reasonable cause of action, lack of *locus standi* and abuse of Court's processes and injunction against the Government and its servants. There is, however, one other issue, which, I think, is pertinent to this case. Assuming that I am wrong on the question of *locus standi*, and that the respondent therefore has *locus standi*, another question arises as to whether this is a sort of case in which the Court would exercise its discretion to issue the declaration applied for. To answer this question it is necessary to examine the substance of the respondent's complaints.

There can be no doubt that the respondent's complaints are grave and serious and have even assumed the status of national importance and celebrity. But what in reality are they?

The respondent objected to the signing of the contract because he said the Ministers involved in the making of the cabinet decision concerning the NSH contract are all guilty of a criminal offence of corrupt practices under Ordinance 22; the allegations being that these Ministers are biased in favour of UEM because UEM belong to UMNO of which the Prime Minister is the President and the Minister of Finance is an important office bearer and that the Minister of Works, who is the President of MIC, sold to UEM one million worth of MIC lottery tickets. The respondent also objected to the government's rejection of tenders of two companies who are UEM's rivals despite the fact that these tenders were much lower. It was therefore scandalous and economically unwise for the government to commit such a huge expenditure from the public fund.

Shorn of any emotional and psychological elements which a complaint of this nature generates, in essence and effect the complaint is an invocation of the Court's aid in order to prevent not merely a threatened illegal act (the signing of the NSH contract) by the Government but also to enforce criminal law against these three Ministers. This raises a constitutional question of great importance involving the position of the Attorney-General and the dichotomy between criminal law and civil law.

In this connection we must remind ourselves of our true function in this appeal. We are not sitting as a criminal Court holding a criminal trial nor are we hearing a criminal appeal. We are also not sitting as a Commission of Enquiry investigating into the wisdom, malpractice and misdeed of the government and its officials. We are only sitting as a ultimate civil Court of appeal of the nation in which our duty is to deal only with such issues of law and facts as relate and are relevant to the case.

As stated previously the basis of the respondent's application for declaration is the allegation of corrupt practice by the Prime Minister and the two Ministers. V.C. George J in the Court below admirably dealt with the legal as well as factual aspects of the offence pertaining to the negotiation and formation of this contract and he finally came to the conclusion that there were issues to be tried. But the question is; are these issues, which are in no uncertain term allegedly criminal, to be tried in a civil Court by the civil process? Is the respondent's application not an invitation to the civil Court to exercise criminal jurisdiction?

In *Gouriet's* case the House of Lords was confronted with similar questions. The House refused to allow the enforcement of criminal law by a civil Court. Lord Diplock reminded the House of the importance of keeping a difference "between private law and public law" meaning, in the context of that case, civil law and criminal law. In the words of Lord Diplock "it is the failure to recognise this distinction that has ... led to some confusion and an unaccustomed degree of rhetoric in this case". I accept this approach in view of the separation of the system of criminal justice from that of the civil justice system. It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the Court's power to grant that remedy is only at the discretion of the Court. Jurisdiction of a criminal Court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney-General is the guardian of public interest and as the Public Prosecutor, he, not the Court, is in control of all prosecutions. How can a prosecution of this nature be done behind his back? These are some of the most serious objections to the exercise by a civil Court of its discretionary power relating to declaratory and injunctive remedies. Our system requires the public to trust the impartiality and fair-mindedness of the Attorney-General. If he fails in his duty to exhibit this sense of

fairness and to protect public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere.

Finally if the objection of the respondent to the NSH contract is based on the ground of its excessive costs and unfairness to UEM's rivals, the jurisprudence of the Court is that it is not for the Court to interfere in the matter because the wisdom and policy decision of the Government belongs to the Government. We cannot tell the public authority how to exercise its power (per Lord Justice Lawton in *Blackburn's* case [1980] TLR 13 at p. 15). Consequently, all those figures and reports showing economic feasibilities for and against the project are absolutely irrelevant and serve no purpose.

In view of what I have said earlier I would allow the appeals and order that the suits against UEM and the Government be dismissed and the interim injunction discharged. I would also order that deposit of the appeal paid by UEM be refunded and as regards costs each party should bear its own costs both here and in the Courts below.

Abdul Hamid CJ:

This appeal raises an issue of considerable importance. The central issue revolves round the question of '*locus standi*' of a private person seeking declaration and an injunction in a case for the enforcement of a public right purportedly for public interest.

'*Locus standi'* is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a Court of Law, if that Court recognises his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.

Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the Court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on a interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.

Now, there are two limbs in the arguments that standing rules help in the allocation of scarce judicial resources. One of these is that liberalising the rules will open the flood gates to litigation: see *Dyson v. AG* [1911] 1 KB 410. The other is that judicial resources being always strictly limited, when there are competing claims for access to the Courts by a busybody on the one hand and an individual with a genuine grievance on the other, priority ought to be given to the latter over the former.

A justification for standing rules relates to standing as a function of the adversary system. Self-interest is seen as the motivating force that will ensure that the parties present their respective positions in the best possible light. If the motivation of self-interest is non-existent so that the ensuing dispute is not with respect to contested rights and obligations of the parties themselves, then the assurance of diligent preparation and argument cannot exist. To quote the Law Reform Commission of British Columbia, Report on Civil Litigation in the Public Interest 1980 quoting *Baker v. Carr* 369 US 180 [1961] at 284:

> Access to the Courts must be restricted to those who have a personal interest in the litigation if, in the words of the Supreme Court of the United States, the Courts are to ensure that

> concrete adverseness which sharpens the presentation of issues upon which the Courts so largely depends.

The other justification for standing rules relates to the private individual plaintiff suing with respect to a matter of public interest unless the Attorney-General consent reflects a constitutional principle about the division of responsibility between the executive and the judiciary; see e.g., *Gouriet v. Union of Post Office Workers* [1978] AC 435, 490 per Viscount Dilhorne. Alternatively, an institutional view is advanced which notes that the public interest embraces broader concerns than those properly addressable by Courts of law:

> The decisions to be made as to public interest are not so much as Courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the Courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies *ibid* at p. 482 per Lord Wilberforce.

I would not analyse very briefly the judgment of the Court below and the cases relied on therein as showing that the plaintiff in the instant case had the necessary *locus standi* to bring and to maintain the present proceedings.

In the first place, the learned Judge referred to the oral judgment of the Supreme Court reversing the High Court Penang by imposing the injunction hereinbefore mentioned against UEM.

The oral judgment of the Supreme Court was very brief and is hardly necessary that it be set out here. It is to be observed that the *locus standi* point was not an issue before the High Court in Penang where the application for injunction was refused on three separate grounds: (a) that the injunction sought although in form against UEM was in substance and intent an injunction against the Government and so s. 29 of the Government Proceedings Ordinance 1956, constituted an absolute bar to the application; (b) that having regard to the balance of convenience to grant the injunction would amount to impugning the powers of the Government to enter into contracts and, so, contrary to public interest and (c) that there had been long and unexplained delay on the part of the plaintiff both in the institution of the suit and the bringing of the application. In this regard I fully subscribe to the finding of the learned Judge Edgar Joseph Jr. as to the construction to be placed on s. 29 of the Government Proceedings Ordinance 1956.

The Supreme Court clearly had dealt with only ground (a). As to the *locus standi* point, there was only a casual reference made to it.

It is therefore understandable why the point was taken before the learned Judge that the judgment of the Supreme Court on the issue of *locus standi* was merely *obiter dicta*.

The learned Judge did not however feel constrained to decide whether this part of the judgment of the Supreme Court was *obiter dicta* or *ratio decidendi*. Instead he expressed the view that - "In the instant case, the judgment of the Supreme Court is a mere precedent that bears analysis to discover what is *ratio* and what is *dictum* and whether the finding were *per incuriam* or otherwise." He therefore concluded that it was not a judgment which it was open to him to review and proceeded to observe that "even the Supreme Court may not review its own judgments." With respect, I would say that while the Supreme Court will not review its own decisions, it may however, where necessary, depart from a previous decision, though it will not, of course, lightly do so.

At this point I refer to the case of *Williams v. Fawcett* [1986] 1 QB 604 at 615, 616 (CA)

where Sir John Donaldson MR, after stating that exceptional case to depart from its previous decisions, approved the following passages in *Young v. Bristol Aeroplane Co. Ltd.* [1944] KB 718 at 729:

> Where the Court has construed a statue or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the Court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam.* We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this Court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.

and in *Morelle Ltd. v. Wakeling* [1955] 2 QB 379:

> As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not necessarily exhaustive, cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistent with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene MR, of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked ... As we already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the judgments were based and to say of it: 'Here was a manifest slip of error'.

In *Attorney-General for Ontario v. Canada Temperance Federation* [1946] AC 193, a Privy Council case, Viscount Simon observed: "Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as the House of Lords is by their own judgments."

But when Lord Gardiner became Lord Chancellor he took a leading part in the discussions on precedent. On 26 July 1966, he made a statement in the House of Lords when all the then Lords of Appeal in Ordinary were present. The crucial paragraph in his statement was as follows:

> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the development of the law. They propose, therefore, their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In *Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29, Raja Azlan Shah FJ (as he then was) speaking for the Federal Court, said this:

> However, I would once again emphasize what has so often been said before, that precedents are not to be slavishly followed; a case **may** be followed only for its strict *ratio decidendi*. (Emphasis supplied) ...

Reverting to the judgment of the Supreme Court, my view is that since the point as to *locus standi* had not strictly been in issue, it is wholly gratuitous and entirely *obiter*. Indeed the decision therein turned on one issue only; namely, whether or not the High Court in Penang

had construed s. 29 of the Government Proceedings Ordinance 1956 too widely.

I must now direct my attention to the *locus standi* point which arises acutely for decision in the application to strike out which has been fully argued before us.

Clearly, the main hinge upon which the judgment of the learned Judge rested as regards the *locus standi* point was the judgment of the Federal Court in *Othman Saat v. Mohd. Ismail* [1982] 1 MLJ 177.

Having regard especially to the very full arguments which have been addressed to the Court and the obvious public importance of the case before the Court, I consider that the time is now ripe for us to restate our position on the law of standing in this country.

It was Lord Denning who first provided the running to liberalise the law of standing in England. He did this in two ways; first, he recognised every one's interest in seeing the law enforced and secondly, in according that recognition to all public law cases, no matter what the remedy sought was. To illustrate I shall quote from his judgment in *ex parte Blackburn* [1976] 1 WLR 550 at 559:

> I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the Courts of law and seek to have the law enforced, and the Courts in their discretion can grant whatever remedy is appropriate.

He did, however, add that as a matter of discretion, the prerogative remedies will be refused "to a mere busybody who is interfering in things which do not concern him" (at p. 559).

I now refer to *Gouriet v. Union of Post Office Workers, supra*. In that case there was a proposed temporary union ban on communications to and from South Africa. The ban would have been criminal, and yet, the Attorney-General, without explanation, refused to sue or lend his name to a relator action. In the Court of Appeal Lord Denning thought that the case involved a point of high constitutional principle (at pp. 736, 737) and asked "What is to be done about it? Are the Courts to stand idly by? Is the Attorney-General the final arbiter as to whether the law should be enforced or not?" And then he concluded: "The plain fact is that the law must be obeyed."

The House of Lords, however, did not agree and reversed the Court of Appeal judgment. The majority view there was that the same standing rule applies whether the remedy sought is a declaration or an injunction. Either the plaintiff's "rights" must be at stake, or, if the matter does not concern private rights, the plaintiff must suffer or be about to suffer "special damages" peculiar to himself. The main plank in the reasoning of their Lordships regarding the monopoly enjoyed by the Attorney-General in speaking for the public is best illustrated by the following passage in the judgment of Lord Diplock:

> My Lords, at the heart of the issue in these appeals lies the difference between private law and public law. It is the failure to recognise this distinction that has in my view led to some confusion and an unaccustomed degree of rhetoric in this case.

It is true to say, however, that *Gouriet's* case was distinguished in the House of Lords case of *Regina v. Inland Revenue Commissioner, ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617 (popularly known as the *Fleet Street Casuals* case). In that case, the applicant was a company formed to promote the interest of small businesses. It alleged that its constituents and other non-unionists were pursued without mercy for not paying their taxes. The applicant accordingly sought judicial review of a deal struck by the

Revenue with printing industry unions following the offer of an amnesty whereby certain tax investigations would be dropped in return for union co-operation in securing an end to casual workers evading income tax by using fictitious names. On the ground that the unions were receiving preferential treatment, *mandamus* and declaratory relief were sought.

In these circumstances, the applicant could point to no injury or "interest" beyond the sense of grievance at what seemed to them as preferential treatment being accorded to union members in defiance of the law. At the hearing before the Divisional Court, pursuant to leave having been granted *ex parte* for judicial review, the Revenue appeared and challenged the applicant's standing by way of a preliminary objection.

The preliminary objection was upheld and the application dismissed without an examination of the merits.

The House of Lords were unanimous that it was at least "unfortunate" (per Lord Wilberforce) for the Divisional Court to have determined the standing issue without regard to the merits.

Lord Wilberforce insisted that standing was a threshold issue whilst at the same time maintaining that except in the most obvious cases, it would usually be convenient to postpone consideration of the issue until argument on the merits. He also said that taxpayers usually lacked standing to litigate the affairs of other taxpayers. But he did also say (at p. 633):

> That a case can never arise in which the acts or abstentions of the revenue can be brought before the Court I am certainly not prepared to assert, nor that, in a case of sufficient gravity, the Court might not be able to hold that another taxpayer or other taxpayers could challenge them. Whether this situation has been reached or not must depend upon an examination, upon evidence, of what breach of duty or illegality is alleged.

And, further down, at p. 634:

> a sense of fairness as between one taxpayer or group of taxpayers and another is an important objective, so that a sense of unfairness may be the beginning of a recognisable grievance.

Lord Roskill shared Lord Wilberforce's view when he made the concession that there is a possibility of judicial review at the instance of strangers if the government's behaviour were "grossly improper" (at p. 662) and emphasised the need in most cases to proceed to a hearing on the merits before the question of standing could be examined. Nevertheless, he rejected Lord Denning's "high constitutional principle" in the *Blackburn* case saying that it amounted to the virtual abolition of the standing requirement (at p. 661). Lord Fraser, on the other hand, expressed agreement with Lord Wilberforce and Roskill and then asserted that standing was not simply a matter of discretion. He concluded, however, that an "exceptionally grave or widespread illegality" might be judicially reviewable by any taxpayer (at p. 647). Lord Diplock approved of Lord Denning's "high constitutional principle" for cases involving "flagrant and serious (governmental) breaches of the law" (at p. 644). He said the "whole purpose" of the leave requirement (which under the new O. 53, r. 3(7) introduced a common standing test namely that of a "sufficient interest") is to filter out hopeless cases (p. 643). So also, Lord Scarman who approved of Lord Denning's approach (at p. 654) adding that the leaving requirement was a matter for judicial discretion and was designed solely to filter out hopeless cases or cases brought by "busybodies" (at p. 953).

Clearly, therefore, those members of the Court in the *Fleet Street Casuals* case who were in favour of retaining the requirement of standing were of the view that the requirement should no longer be defined by using different formulae appropriate to the different remedies

available in public law. The term "sufficient interest" in the new English O. 53, r. 3(7) - which incidentally has no counterpart in our Rules of the High Court 1980, was sufficiently flexible to express a requirement which can vary as the relationship between the subject matter, the remedy sought and the applicant varies (at pp. 631, 645-646 and 658-659).

For a true appreciation of the *Fleet Street Casuals* case some general observations should be made regarding the English Rules of the Supreme Court which were re-written in 1977 with the introduction of a new O. 53. The new Rules preserve the prerogative remedies two stage process but are no longer referred to as rules *nisi* or absolute. Applicants must apply (usually *ex parte*) for leave to file an originating motion seeking judicial review. Short time limits apply and discovery and interrogatories are available. The procedure has not only been standardised for orders in the nature of the old prerogatory remedies but it is also expressed as being applicable where a declaration or an injunction is sought. In *O'Reilly v. Mackman* [1983] 2 AC 237, the House of Lords has held it is an abuse of process to bypass the leave requirement of O. 53 by issuing a writ for a declaration or injunction. It is important to note, as I have earlier observed that O. 53 r. 3(7) introduced a common standing test namely that of "sufficient interest."

It has been said that the modern approach to standing in England under the new O. 53 can be summarised thus; provided that the applicant has an arguable case he will probably be given leave to apply for judicial review. At the full hearing, if he has a meritorious claim, the Court will strive to accord *locus standi* so long as he is not a mere busybody with no legitimate complaint; see R.J.F. Gordon on *Judicial Review Law and Procedure* - para. 4-07 p. 51.

But even in England under the present relaxed standards which apply to standing if the applicant's interest in the matter under dispute is not direct or personal but is general or public, it will be for the Court to determine whether he has the requisite standing to apply for judicial relief. Moreover, it has been said that the formula "sufficient interest" is not intended to create a class of persons popularly referred to as private "attorney-generals" who seek to champion public interests in which they are not themselves directly or personally concerned, under the guise of applying for judicial review; See Annual Practice, 1985 p. 765 paras. 53/1 - 14/47.

But in Malaysia there is no provision in our Rules of the High Court equivalent to O. 53 r. 3(7) of the English Rules of the Supreme Court. Thus, in my view, there shall be stringent requirement that the applicant, to acquire *locus standi*, has to establish infringement of a private right or the suffering of special damage: see *Gouriet v. Union of Post Office Workers, supra*, and also *Boyee's* case (13) and this, I consider, to be the relevant test to apply when determining the question of standing.

It is noteworthy, that in the *Fleet Street Casuals* case Lords Diplock and Scarman made the significant assertion that before the new O. 53, declarations and injunctions were confined to private law, being available only to those whose "rights" were infringed or threatened. Moreover, the majority distinguished the *Gouriet* case (*ibid*) on the basis that the standing rule applicable to declarations and injunctions was now different where O. 53 was being used (at pp. 638-639, 649 and 657-658). The new O. 53, they said, introduced not merely a standard procedure for all public law remedies but also a common standing test, namely the O. 53 r. 3(7) "sufficient interest" test. Some of the judgments accepted that this formula was flexible enough to allow for differences in approach having regard to the relief sought (at pp. 631, 645-646, 658-659). Others acknowledged that the new rule was the occasion for rethinking their position on the law of standing (at pp. 631, 646-646 and 647-648).

In all the circumstances, I would treat the *Fleet Street Casuals* case as one based upon a unique rule of Court which has no counterpart in this country. This point is a crucial factor which does not appear to have been taken into consideration by the Judge in *the Othman Saat* case. In any event, as I have already noted, I would prefer the test of standing propounded by their Lordships in the *Gouriet* case; that is to say, the same standing rules apply whether the remedy sought is a declaration or an injunction. And, either, the plaintiff's "rights" must be at stake, or when, as in the present case, the matter does not concern private rights, the plaintiff must suffer or be about to suffer damage peculiar to himself. In the *Othman Saat* case a liberal approach in considering the requirement of a *locus standi* was advocated. Speaking for myself, I would hesitate to say that a mere 'legitimate grievance' or 'a real interest' in the suit will suffice to show standing to sue. Be that as it may, I would say that the decision in *the Othman Saat* case was correct having regard to the facts of that particular case.

Applying the preferred test, I fail to see how in the particular circumstances of this case, it could be said that the plaintiff had the necessary *locus standi* to institute or maintain the present proceedings. Before I conclude I would touch briefly on the accusations of criminality made against those who participated in the Cabinet decision.

In his statement of claim which was verified by his affidavit filed in support of the application for the interlocutory prohibitory injunction, the plaintiff claimed that he was bringing this action as a Member of Parliament, leader of the Opposition, a taxpayer, a motorist and a frequent user of highways and roads in the country. He has cited as defendants to the action UEM, the Minister of Finance, the Minister of Works and the Government of Malaysia as defendants. He has prayed that the Court should declare the award of the letter of intent null and void and for an order restraining UEM from entering into any contract pursuant to the letter of intent. To quote his Counsel when speaking for him before the learned Judge "the core of his contention was the contravention of s. 2 of the Ordinance No. 22 of 1970." In particular, it was contended that UMNO would benefit by the award of the contract to UEM and this amounted to an advantage to members of UMNO who participated in the decision making process at the Cabinet meeting concerned thus resulting in the contravention of s. 2 of the Ordinance.

The learned Judge appears to have been much impressed with these submissions for, after reviewing a number of cases where accused persons were prosecuted for offences in contravention of s. 2 of the Ordinance, he concluded that "the contention of Counsel for the plaintiff appears to be well founded. The statement of claim certainly raises serious questions to be tried within the meaning of *American Cyanamid*. That the claim of the plaintiff is frivolous or vexatious or an abuse of the process is without merit."

With all due respect to the learned Judge, my view is clear in that fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy - the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. I am inclined to the view that it should be left to the Attorney-General to bring an action, either of his own motion or at the instance of a member of the public who "relates" the facts to him: see *Gouriet* case (*ibid*).

Finally, I would like to refer to a query that was raised in the course of the appeal in relation to s. 29 of the Government Proceedings Ordinance 1956 considered in the light of *ex parte Herbage*. The respondent's answer to the point raised was that *ex parte Herbage* did not

apply in view of our O. 53. And that the definition of "civil proceedings" in s. 2(2) of the Ordinance should refer to the position as it stood in 1956 when the Ordinance was enacted and should not therefore be affected by changes brought about to the English O. 53 in 1977.

Tan Sri Eusoffe Abdoolcader SCJ said that there was a lack of substance in this proposition. The question is was there really? It is to be observed that the changes brought about by the English O. 53 in 1977 resulted in an omnibus provision to include not only the prerogative orders of *mandamus*, prohibition and *certiorari*, but also the remedies of declarations, injunctions, etc. It may well be argued that the correct answer is to be found in the so called principle that a statute is to be treated as always speaking and that the exception in s. 2(2) of the Ordinance is an on-going statutory provision. The elementary point to note, however, as regards s. 29 of the Ordinance is that it affords a defence to the Government or a servant of the Government to a claim for an injunction subject to compliance with the requirements therein stated. The section therefore deals with rights and not procedure.

That being so, the question which arises is whether such a defence which cannot be said to be available if the point had arisen for decision prior to 1977 can be said to have been taken away by the simple expedient of an amendment to a rule of Court made subsequently in a foreign jurisdiction. I regret I find myself unable to subscribe to this proposition since not only are we an independent sovereign country whose Parliament has seen fit to repeal the right of appeal to the Judicial Committee of the Privy Council in all matters but also because we have our own O. 53 which is limited to prerogative orders only and does not extend to claims for declaration, injunction or damages. Clearly, any lengthy discussion on s. 29 should not have overlooked this crucial factor.

I would accordingly hold that the exception to the definition of "civil proceedings" in s. 2(2) of the Ordinance which reads "or such proceedings as would in England be brought on the Crown side of the Queen's Bench Division" must refer to the prerogative jurisdiction of the Queen's Bench Division in England as at the date of the coming into force of the Ordinance and which was then limited to the granting of orders of *mandamus*, prohibition and *certiorari* only.

Consequently, as the claim in the present case was for a declaration and injunction it fell fairly and squarely within the four walls of the definition of "civil proceedings" appearing in s. 2(2) of the Ordinance. It follows that the defence under s. 29 applies and the case of *ex parte Herbage* is, therefore, wholly inapplicable.

In consideration, I would allow both the appeals and hereby order that both the orders of the Judge be set aside and both suits be dismissed and injunction set aside. As to the costs my order is that each party shall bear its own costs here and in the Court below.

Hashim Yeop Sani SCJ:

The crucial question in both the appeals is the question of *locus standi* of the respondent, Mr. Lim Kit Siang. Has Mr. Lim Kit Siang standing, i.e., the qualifications in law, to bring the suit in Court?

The first difficulty to surmount in this regard is what appears to be a ruling on the *locus standi* of the respondent made in the oral judgment of the Supreme Court (Lee Hun Hoe CJ, Borneo, Wan Suleiman SCJ and Wan Hamzah SCJ) delivered by Lee Hun Hoe CJ Borneo and appears at p. 174 of the Appeal Record in Civil Appeal No. 434 of 1987 as follows:

> We have considered a number of authorities both English and local as to the question of *locus standi.* We need only say that on the facts of this case the appellant clearly has *locus standi* to bring this suit.

The appeal before the Supreme Court then was from the judgment of Edgar Joseph Jr. J who had refused an interlocutory prohibitory injunction sought by the respondent restraining United Engineers (M) Bhd. by itself or through its agents and/or servants from signing the proposed contract on the North-South Expressway. The refusal by the learned Judge was based on the grounds *inter alia* that the injunction if granted would be in violation of s. 29 of the Government Proceedings Act and also that the balance of convenience would be against granting the injunction. It is clear from the record that the question of *locus standi* was not an issue before Edgar Joseph Jr. J and as such *locus standi* was never an issue in the memorandum of appeal before the Supreme Court then. It would appear that the question of *locus standi* of the respondent was casually raised in the course of argument in the appeal.

A precedent is "in point" if there was raised, argued and decided in it in relation to one set of facts some issue of law which is the same as has arisen now before the Court. In as much as it is the function of the Court deciding in a later case to ascertain what the *ratio* of a precedent is, it must also decide what is mere *obiter dicta* or *judicial dicta* i.e., not part of a *ratio* but relevant only to a collateral matter.

Dealing with the question when a Court is bound by the judgment of another Court, either superior or coordinate, Viscount Dunedin in *Great Western Railway Co. v. Owners of SS Mostyn* [1927] AC 73 said at p. 73:

> And if from the opinions delivered it is clear - as is the case in most instances - what the *ratio decidendi* was which led to the judgment, then that *ratio decidendi* is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a *ratio decidendi* to order to be bound by it.

In my view the circumstances under which the question of *locus standi* was raised and the reference to it in the sketchy oral judgment of the Supreme Court then should not preclude this Court from considering the question of *locus standi* of the respondent where before this Court the issue was canvassed throughout as a fundamental issue and argued at great length by both parties.

On the question of binding precedents the House of Lords is no longer bound by its own previous decisions - see *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeals in Ordinary on 26 July 1966. The Indian Supreme Court in *The Bengal Immunity Company Limited v. The State of Bihar & Ors.* [1955] 2 SCR 603 held that it would not be bound by its own previous decisions and that nothing in the Constitution prevented the Supreme Court from departing from its previous decisions. The United States Supreme Court too has a number of times reversed itself. The Privy Council has also held that it was not absolutely bound to follow its earlier decisions. In this country too the appellate Court has been known to reverse its previous decisions as shown in *PP v. Ooi Khai Chin & Anor*. [1979] 1 MLJ 112 Where the Federal court reversed its previous desision in *PP v. Tai Chai Geok* [1978] 1 MLJ 166 on the question of interpretation of jurisdiction.

Of course the decision to depart from precedents must be exercised with caution and circumspect. It is a question of judicial responsibility. It is also a question of competing claims between justice and certainty. As Lord Gardiner LC said:

> Too rigid an adherence to precedents may lead to injustice.

Now I come to the real crux of the matter. The basis of the claim of the respondent as set out in his statements of claim was explained in great length in the judgment of the learned Judge, VC George J whose decision is challenged in the present appeals. According to the

pleadings it was the contention of the respondent that the contract which United Engineers (M) Bhd. proposed to enter into with the government apart from being unlawful would be adverse to the interest of the respondent as well as that of the public and that the Court should declare the letter of intent null and void and of no effect because it was tainted by the alleged breach of the provision of Emergency Ordinance No. 22. Looking at the basis of his claims and the nature of the reliefs sought it is quite obvious on the law as it now stands that Mr. Lim Kit Siang can come to Court only with the consent of the Attorney-General or by means of a relator action.

The principle that the jurisdiction of the Court can be invoked by one who seeks to protect a legal right or to obtain a declaration of legal rights as between him and some other person or authority has been extended to permit the institution of proceedings by the Attorney-General on behalf of the public. The Attorney-General represents the public in this regard. The intervention of the Attorney-General is founded on the principle that the Crown is *parens patriae* and that the Attorney-General appears for and represents the public interest. Traditionally it has been held to be basic that if the Attorney-General does not sue *ex officio* or allow someone else to sue *ex relatione* no one else can claim to represent the public interest.

It is a fundamental principle that private rights can be asserted by individuals, but public rights can only be asserted by the Attorney General as representing the public. The Courts have no jurisdiction in any circumstance to clothe a plaintiff with the right to represent the public interest.

Therefore however much one may admire Mr. Lim Kit Siang for being public-spirited to raise in Court a subject which he thinks is of national importance one must not be blind as to what is the proper law to apply to see whether he has the qualifications in law to do so. To shut out from our minds what is the proper law to apply just to enable him to ventilate his grievance would be an abdication of our duty as interpreters of the law.

In England the amendment to O. 53 of the Rules of the Supreme Court came into effect on 11 January 1978 and provides in r. 3(5) thereof for the test of "sufficient interest in the matter" before leave is granted for remedies in judicial review. This test to give standing to a party replaced the old judicially created rule of "aggrieved person". The test of "sufficient interest in the matter" is also laid down in s. 31(3) of the English Supreme Court Act 1981. This provision appears under Part II of the Act which deals with "jurisdiction". No such amendment has been made to any of our laws in this country.

Viscount Dilhorne in *Gouriet v. Union of Post Office Workers* [1978] AC 435 dealt with O. 15 r. 16 of the English Rules of the Supreme Court which is identical with O. 15 r. 16 of our Rules of the High Court 1980. It reads:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

Viscount Dilhorne said at p. 495:

> It does not provide that an action will be whenever a declaration is sought. It does not enlarge the jurisdiction of the Court. It merely provides that no objection can be made on the ground only that a declaration is sought.

In short, O. 15 r. 16 of our Rules of the High Court 1980 cannot be made into a basis of jurisdiction for the Court to entertain an action which is not properly before it.

The language of our O. 15 r. 16 is the same as that in the old English O. 25 r. 5 of 1883. On this Viscount Dilhorne said at p. 495 that:

> It provides no ground for saying that since 1883 the Courts have had jurisdiction to entertain an action instituted by a person other than the Attorney-General who does not claim that any personal right or interest will be affected and who is seeking just to protect public rights.

What then is the proper law to apply to determine the *locus standi* of the respondent here? In my opinion the principle in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 as approved in *Gouriet* is still the law applicable in this country. Buckley J propounded the law as follows:

> A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with .... ; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

In my view we ought also to apply the common law principle enunciated in *Boyce* by virtue of s. 3 of the Civil Law Act 1956.

In Australia the same strict test was applied by the High Court when dealing with the question of *locus standi* as illustrated in *Australian Conservation Foundation v. Commonwealth of Australian* [1979-80] 28 ALR 257. The main purpose of the suit there was to challenge a decision to approve the establishment of a resort and tourist area. The Foundation was a body involved with issues affecting environment. The High Court denied standing to the Foundation. The High Court held it to be clear that "an ordinary member of the public who has no interest other than that which any member of the public has in upholding the law has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty". Gibbs J also said:

> A belief however strongly felt that the law generally or a particular law should be observed or that conduct of a particular kind should be prevented does not suffice to give its processor *locus standi*.

In this country the principle was in fact correctly stated by the Federal Court in *Tan Sri Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 133 that "the sensible approach" in a matter of *locus standi* in injunctions and declarations would be to regard it as a matter of jurisdiction, where there is an assertion of an infringement of a contractual or a propriety right, the commission of a tort, a statutory right or a breach of a statute which affects the plaintiff's interest substantially or where the plaintiff has a genuine interest in having his legal position declared. Indeed the principle enunciated there is consistent with the principle enunciated by Buckley J in *Boyce*. However in my view the Courts in this country are not authorised by law to go beyond this principle.

No doubt s. 41 of our Specific Relief Act 1950 is an old provision and may even be regarded as antiquated but it is still in the statute book as part of our law. In the Specific Relief Act s. 41 comes under the chapter "Declaratory Decrees" and deals with person seeking declarations of status or right from the Court. That section reads:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

Section 41 does not sanction every form of declaration but only a declaration that the plaintiff is entitled to a specific legal character or to any right as to property. Therefore any person who has "a right to any legal character" may bring an action against anyone who denies that right. The prerequisite for such a declaratory action is that the plaintiff must first establish that he qualifies as a person **entitled** to any **legal character** or to any **right** as to any property. The legal character or the right must exist at the time the action is instituted.

After 1978 the law on *locus standi* in England was extended and liberalised by the English Courts. But in my opinion the Courts in this country have no jurisdictional basis to do the same.

This appeal, in my opinion, illustrates once again the point that we should not slavishly apply the laws in England without comparing the basis of jurisdiction. If it is felt that there is a lacuna in the law in that not every public-spirited person can come to Court then it is up to the legislature to amend the appropriate law to give jurisdiction to the Courts to entertain every such person. The Courts should not pretend to perform the function of the legislature.

It can hardly be disputed that there is no single authoritative definition of an aggrieved person but in general it can be said that a person "aggrieved" is not merely one who is dissatisfied with some act or decision but one who has been wrongly deprived of or has been refused something to which he is legally entitled. Any person can come to Court for the protection or enforcement of his rights. The basis of his standing is the assertion of his private rights. As Lord Edmund Davies said in *Gouriet*:

> It has long been established that no citizen can of his own initiative sue in our Courts on his own behalf save to assert and protect his private rights or to repel a right asserted against him by another.

Thus in my view according to the law applicable in this country Mr. Lim Kit Siang has no qualifications in law to bring the suit in Court. He has not shown that he is more particularly affected than other people. He has not shown that he has any recognisable legal right which has been infringed. He has not suffered any damage peculiar to himself by reason of the alleged breach of Emergency Ordinance No. 22.

In short it has not been shown that the rights or interests of Mr. Lim Kit Siang have been adversely affected over and above that of "the ordinary taxpayer, motorist and frequent user of highways" as he described himself. The fact that he is also a Member of Parliament or the leader of the Opposition does not alter the position. In those capacities he may acquire standing in other forums.

I would therefore allow the appeal, set aside the order of the learned Judge and dismiss the suit.

I also agree that parties bear their own costs here and below.

George Seah SCJ (dissenting):

There are 2 appeals before this Court. The first appeal (No. 434 of 1987) is by the Government of Malaysia against the dismissal by the learned Judge (V.C. George J) of their application to strike out the statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 and the inherent jurisdiction of the High Court. The second appeal (No. 456 of 1987) is by United Engineers (M) Berhad or UEM in short against the refusal by the same Judge (a) to

set aside the interlocutory injunction granted by the Supreme Court (Lee Hun Hoe CJ Borneo, Wan Suleiman and Wan Hamzah SCJJ) on 25 August 1987 and (b) to strike out the suit under O. 18 r. 19 of the Rules of the High Court 1980 and the inherent power of the High Court. The respondent in both these appeals is Lim Kit Siang. The learned Attorney-General has raised a number of important issues of law and procedure and I think I should deal with them.

Locus Standi of the respondent to bring this suit

Both the learned Attorney-General and learned Counsel for UEM have submitted strongly that the learned Judge erred in law and in fact in holding that on the facts of the case the respondent has *locus standi* to bring this suit.

It is my considered opinion that this issue of *locus standi* had been considered and decided by the Supreme Court (Lee Hun Hoe CJ Borneo, Wan Suleiman and Wan Hamzah SCJJ) when it granted the interlocutory injunction to the respondent on 25 August 1987. In fact, the standing of the respondent to institute this proceeding was raised by learned Counsel for UEM and from the record of appeal, the learned Senior Federal Counsel who appeared for the Government of Malaysia took part in the legal arguments. The Supreme Court disposed of this issue in the following words:

> We have considered a number of authorities both English and local as to the question of *locus standi*. We need only say that on the facts of this case the appellant (Lim Kit Siang) clearly has *locus standi* to bring this suit.

The learned Judge was right to hold that he was bound by the decision of the Supreme Court of 25 August 1987 on this point and I agree with him. In my opinion, this appeal is an attempt to urge this Court, albeit differently constituted and enlarged, to review and reverse the decision made by the Supreme Court on 25 August 1987 and it is my considered opinion that this Court has no jurisdiction to do so.

The latin phrase "*locus standi*" as used by the Courts" in England or "standing in Courts" as the term is commonly understood by the lawyers in the United States of America, seems to indicate that a persons is allowed by the Judges to appear and be heard in a legal proceeding. It is a procedural barrier erected by the Judges to prevent the Court's time and public money from being wasted by multiplicity of frivolous and vexatious litigations brought by busybodies whose actions are bound to fail in limine and also to prevent abuse of the legal process.

In *IRC v. Federation of Self-Employed* [1982] AC 617; [1981] 2 All ER 93 at p. 103G Lord Diplock said:

> The rules as to "standing" for the purpose of applying for prerogative orders, like most of English public law, are not to be found in an statute. They are made by Judges; by Judges they can be changed, and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded. Those changes have been particularly rapid since the 1939-45 wars. Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today.

In the same case and after dealing with the question of *locus standi* in public law, Lord Scarman said at p. 113J:

> The discretion belongs to the Court: and, as my noble and learned friend Lord Diplock has

> already made clear, it is the function of the Judges to determine the way in which it is to be exercised .....

In short, the rule as regards "*locus standi*" or "standing in Courts" is not governed by any statutory enactment but is a rule of practice and procedure laid down by the Judges in the public interest. Like all rules of practice, they are liable to be altered by these to suit with the changing times.

In *Tan Sri Hj. Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 the Federal Court upheld the decision of the High Court in giving *locus standi* to the plaintiff who failed in his application for a plot of land at Mersing, Johore. The appellant, Tan Sri Hj. Othman Saat was the Menteri Besar of the State of Johore at the relevant times. And in the *Federation of Self-Employed* case (*supra*) Lord Diplock observed, *obiter*, that he would accord standing to "a single public-spirited taxpayer who brought the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped".

The respondent here is an elected Member of Parliament. Although he represented the parliamentary seat of Tanjung, Penang in the Dewan Rakyat yet "when he is returned and sits in Parliament he serves for the whole realm" (per Lord Shaw quoting Coke in *Amalgamated Society of Railway Servants v. Osborne* [1910] AC 87 at p. 112). Lord Ellenborough CJ in *Morris v. Burdett* [1813] 105 ER 361 at p. 364 said that "every person who is returned to Parliament is bound by the law of the land to serve". Coming nearer home in the case of *Datuk Ong Kee Hui v. Sinyium anak Mutit* [1983] 1 MLJ 37 Salleh Abas FJ (as he then was) in giving the judgment of the Federal Court said at p. 40D:

> Our system of government expects that every member of the legislature, whether Parliament or a State Assembly, should conduct himself with honour and dignity worth of his position as the nation's legislator and for this reason irrespective of his station in life and calling he is given the appellation of "The Honourable" to precede his name. It is because of this high regard and honour in which he is held that he is required to swear under Art. 59 of the Federal Constitution and the equivalent Article of the State Constitution an oath as Member of Parliament or State Assembly (as the case may be) and allegiance, instead of signing a contract as a civil servant does before taking part in the proceeding of the House. The oath binds him in conscience which should guide him how to act not only with regard to his parliamentary or legislative duties but also in his relations with his party and members of the public ....

It is plain from the statements of these distinguished members of the higher hierarchy of the judiciary both in England and Malaysia that as an elected Member of Parliament the respondent has a duty not only to the electorates of Tanjung, Penang but also to the Dewan Rakyat and the peoples of this country. If, as a Member of Parliament the respondent brings this suit *bona fide*, alleging government wrongdoings in about to award a contract in the construction of the proposed North-South Highway to UEM where an enormous sum of public moneys running into billions of ringgit would be spent illegally, I think I would be abdicating my duty if I were to hold that the respondent had no standing to institute this proceeding and that the suit was not properly brought and should not be entertained. I am therefore in complete agreement with my learned brothers in the Supreme Court (Lee Hun Hoe CJ Borneo, Wan Suleiman and Wan Hamzah SCJJ) that on the facts of this case the respondent clearly has *locus standi* to bring this suit. In my opinion, as an elected Member of Parliament, the respondent, conscious of his duty and responsibility to the electorates of Tanjung, Penang, the Dewan Rakyat and the peoples of Malaysia, clearly has a real interest in the subject matter of this suit and therefore has *locus standi* to institute this proceeding. I am not deterred by expressions of opinions in this Court that the rule on *locus standi* should not be expanded. In the field of public law where the Court has a discretion whether or not to make an order

preventing conduct by a public officer or governmental authority that has been shown to be *ultra vires* or unlawful, the question of what qualifications a plaintiff must show before the Court will entertain his application for a declaratory order or judgment seems to me to be one of practice rather than of jurisdiction. The recent trend in England, after the passing of the English Crown Proceedings Act 1947, seems to be that the rule of *locus standi* must be developed to meet the changing times. In broadening the requirements that must be met to give the plaintiff a standing in a public interest litigation the High Court must always bear in mind that under the Federal Constitution of Malaysia, the judicial power is vested in the Judge. And judicial power included judicial control or review of governmental/executive actions except when the jurisdiction of the High Court is expressly excluded by the Constitution (see *Dato Menteri Othman bin Baginda & Anor. v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29). Judicial review is available only as a remedy for conduct of a public officer, executive or person exercising statutory or governmental power which is *ultra vires*, void or unlawful. It is available only in public law (see *Ganda Oil Industries Sdn. Bhd. v. The Kuala Lumpur Commodity Exchange* (Supreme Court Civil Appeal No. 266/85) (unreported)). In a judicial review the Court is not concerned with the reasonableness of the governmental or statutory order but only with its legality (see *Chief Constable of North Wales Police v. Evans* [1982] 3 All ER 141). Similar view was expressed by Lord Diplock in the *Federation of Self-Employed* case (*supra*) at p. 644F in the following words:

> It is not, in my view, a sufficient answer to say that judicial review of the actions of officers of departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy and of that Parliament is the only Judge: they are responsible to a Court of justice for the lawfulness of what they do, and of that the Court is the only Judge.

Proceeding By Way Of A Relator Action

The learned Attorney-General on behalf of the Government of Malaysia takes the point that the learned Judge erred in law when he failed to hold that the respondent should have resorted to "relator" proceedings in the circumstances of the case and he erred further when he held in effect that the law pertaining to "relator" proceedings is archaic and impracticable in Malaysia. In support of this contention the learned attorney-General cited a passage in the judgment of Lord Wilberforce in the case of *Gouriet v. Union of Post Office Workers* [1978] AC 435 at p. 477 which reads:

> A relator action - a type of action which has existed from the earliest times-is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) brings an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in assertion of public rights. If he tries to do so his action can be struck out.

At first sight, this seems an attractive submission until one reads the explanations given by Lord Diplock and Lord Roskill in *IRC v. Federation of Self-Employed* (*supra*) on the *Gouriet* case. At pp. 638-39 Lord Diplock said:

> As respects the claim for a declaration considerable reliance was placed upon the recent decision of this House in *Gouriet v. Union of Post Officer Workers* [1977] 3 All ER 70 and [1978] AC 435, which held that a private citizen, except as relator in an action brought by

> the Attorney-General, had no *locus standi* in private law as plaintiff in a civil action to obtain either an injunction to restrain another private citizen (in case of a trade union) from committing a public wrong by breaking the criminal law or a declaration that his conduct is unlawful unless the plaintiff can show that some legal or equitable right of his own has been infringed or that he will sustain some special damage over and above that suffered by the general public. This decision is, in my view, irrelevant to any question that your Lordships have to decide today. The defendant trade union in deciding to industrial action was not exercising any governmental powers; it was acting as a private citizen and could only be sued as such in a civil action under private law. It was not amenable to any remedy in public law. Lord Wilberforce and I were at pains to draw this distinction.

After referring to *Gouriet* case, an authority much relied upon by the learned Lord Advocate on behalf of the appellants IRC in support of his contentions regarding the circumstances in which declarations might be granted Lord Roskill observed at pp. 657-58:

> But *Gouriet's* case was a relator action and was not concerned with prerogative orders or judicial review, and the relevant observations of your Lordships must be read in the light of that fact and of the subsequent enactment of O. 53 (of the English Rules of the Supreme Court).

In my opinion, *Gouriet* case presented the House of Lords with an opportunity to clarify the role of private citizen in the enforcement of the criminal law. The House replied that the enforcement of the criminal law in England by way of injunction in a civil suit is an altogether exceptional process, to be used with caution and permitted only for special reasons, and available only to the Attorney-General. In my opinion, *Gouriet* case was concerned with private law (law which regulates men's dealings with their fellow men as private citizens) whereas here, in this instant appeal, we are dealing with public law (law which regulates the exercise of government in their broadest sense). This distinction is relevant and necessary and is pointed out by Lord Diplock in *Gouriets* case at p. 500C in the following words:

> The words italicised in the last paragraph are important words for they draw attention to the fact that the jurisdiction of a civil Court to grant remedies in private law is confined to the grant of remedies to litigants whose right in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law, is to move out of the field of private into that of public law with which analogies may be deceptive and where different principles apply.

It is plain that *Gouriet* case is clearly distinguishable from the instant case in that firstly, the respondent instituted this proceeding in his capacity as an elected Member of Parliament, whose duty is not confined to the electorates of Tanjung, Penang but also to the Dewan Rakyat and the peoples of Malaysia. Secondly, the respondent did not bring this suit to enforce the criminal law and lastly, the action appeared to have been brought primarily to test the legality of the proposed government's intention to award the North-South Highway project contract to UEM. In short, it was a public interest suit calling for judicial review on the legality of the proposed executive action. As principal legal adviser to the Cabinet and/or Minister of the Government of Malaysia under Art. 145(2) of the Federal Constitution no one would have expected the learned Attorney-General to give his consent to the respondent to institute this proceedings in a Court of law. On the contrary, I would consider it as a dereliction of his constitutional duty if the learned Attorney-General does not defend the suit vigorously. In my opinion, a "Relator" action has no application in a public interest litigation brought to test the legality of governmental act in a Court of law.

It has been adumbrated that the test formulated by Buckley J in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 should be the proper test to be applied when a member of the public or a citizen sues the public authority without joining the Attorney-General. At p. 114 Buckley J said:

> A plaintiff can sue without joining the Attorney-General in 2 cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g., where the obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway; and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

I am unable to agree with this submission for the following reasons:

(a) this test was laid down by Buckley J in 1902 long before the passing of the English Crown Proceedings Act 1947;

(b) Lord Diplock stated that "Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today (see *Federation of Self-Employed* case at p. 640A);

(c) *Boyce* case had nothing to do with judicial review;

(d) adoption of this test would, in my respectful opinion, be a retrograde step and would have the indirect effect of placing governmental actions outside the purview of judicial control and therefore above the law; and

(e) acceptance of the *Boyce* test would result in implied overruling *Lim Cho Hock v. Government of Perak & Ors.* [1980] 2 MLJ 148 and *Tan Sri Hj. Othman Saat* case (*supra*), the former being a decision of Abdoolcader J (as he then was) and the latter that of the Federal Court. The Supreme Court (Lee Hun Hoe CJ Borneo, Wan Suleiman and Wan Hamzah SCJJ) seemed to have accepted the correctness of these authorities and followed them when they held that the respondent had the *locus standi* to bring this suit and I am in agreement with their opinions. In my opinion, the test of *locus standi* in a public interest litigations, is as laid down by the Federal Court in the *Tan Sri Hj. Othman Saat* case, *viz.* whether the plaintiff has a real interest in the subject-matter of the suit.

Was the Judgment on 25 August 1987 made Per Incuriam

It is submitted by the learned Attorney-General that the judgment of the Supreme Court (Lee Hum Hoe CJ Borneo, Wan Suleiman and Wan Hamzah SCJJ) dated 25 August 1987 was made *per incuriam*. The *per incuriam* doctrine has been explained and restated by Sir John Donaldson MR in a recent case of *Duke v. Reliance Systems Ltd.* [1987] 2 WLR 1125 in the following words:

> I have always understood that the doctrine of *per incuriam* only applies where another division of this Court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the Court had this material, it must have reached a contrary decision. That is *per incuriam.* I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

In my opinion, the submission based on *per incuriam* is misconceived in that when the

Supreme Court delivered the judgment on 25 August 1987 it was made after hearing arguments from the learned Senior Federal Counsel representing the Government of Malaysia, learned Counsel acting for UEM and learned Counsel appearing for Lim Kit Siang. It seems to me that the Supreme Court had considered all the arguments, authorities and statutes relevant to the case and the learned Attorney-General is unable to point to any particular ordinance or binding authority which had inadvertently been disregarded by the Supreme Court except to show that he disagreed with the interpretation of the scope of s. 29 of the Government Proceedings Act 1956 given to it by the learned Judges of the Supreme Court and the decision of the Supreme Court that on the facts of this case the respondent clearly had the *locus standi* to bring this suit. In my opinion, the learned Attorney-General therefore fails to bring his case within the *per incuriam* rule as stated by Sir John Donaldson MR in the above mentioned case.

Was The Judgment Of 25 August 1987 Binding On The High Court

The next legal point taken by the learned Attorney-General and learned Counsel for UEM is that the interlocutory injunction granted by the Supreme Court (Lee Hun Hoe CJ Borneo, Wan Suleiman, Wan Hamzah SCJJ) on 25 August 1987 was by nature provisional only and that such an Order may be revised or discharged by the Judge who made it or by another Judge of the High Court in the light of subsequent evidence and argument. As authority for this proposition the case of *WEA Records Ltd. v. Visions Channel 4 Ltd. & Ors.* [1983] 2 All ER 589 is relied upon.

For the respondent it was argued by learned Counsel that the interlocutory injunction was granted by the Supreme Court after hearing arguments from learned Counsel representing the respondent, the Government of Malaysia and UEM. Although the learned Attorney-General seems to complain that very short time was given to his chambers to prepare the case when the appeal came up for hearing on 25 August 1987 yet the record of appeal does not disclose any application having been made to the Supreme Court for a postponement. Unlike *WEA Records* case learned Counsel for the respondent has submitted that the interlocutory injunction of 25 August 1987 was granted by the Supreme Court and not by a Judge of the High Court. Being an interlocutory injunction, learned Counsel concedes that it is in a sense a provisional order and may be set aside or varied by a Judge of the High Court but only if the aggrieved party can prove (a) a change of circumstances or new facts having come to light after 25 August 1987 and/or (b) suppression of material facts when applying for the interlocutory injunction before the supreme Court on 25 August 1987.

I agree with the contention of learned Counsel for the respondent that the interlocutory injunction granted by the Supreme Court on 25 August 1987 can only be discharged or varied under the 2 circumstances set out in (a) and (b) above. In my opinion, the interlocutory injunction was granted by the Supreme Court in the exercise of its original discretionary jurisdiction and is not therefore subject to review by the High Court except under the 2 circumstances above mentioned. It is in that context that the words "With liberty to apply to the Court below" which are inserted by the Supreme Court, is to be understood. The phrase "With liberty to apply" in my opinion, does not entitle an aggrieved party to apply to a Judge of the High Court to review the original discretion exercised by the Supreme Court. To allow this is to place the Judge in an invidious position. In this respect, the facts of this case are distinguishable from *WEA Records* case.

Now, when UEM applied to the High Court to discharge the interlocutory injunction of 25 August 1987 they did not appear to rely on a change of circumstances or fresh facts which had come to light after 25 August 1987 which would justify the learned Judge reviewing

the matter in the light of these new facts. The learned Judge was right not to reopen the case in the absence of fresh facts. Dealing with the complaint of suppression of material facts the learned Judge rejected this allegation and I do not disagree with him on this finding. In my opinion, the learned Judge applied the law correctly when he dismissed the application of UEM to discharge the interlocutory injunction 25 August 1987.

No Reasonable Cause Of Action Against UEM

It is the submission of learned Counsel for UEM that on the facts as pleaded in the statement of claim the respondent has no reasonable cause of action against UEM. Learned Counsel seems to forget that this suit brought by the respondent against UEM and the Government of Malaysia is for a declaratory judgment under O. 15 r. 16 of the Rules of the High Court 1980 which provides that "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed." O. 25 r. 5 of the English Rules of the Supreme Court 1883 is the forerunner of O. 15 r. 6. The validity of O. 25 r. 5 was unsuccessfully attacked in *Guaranty Trust Co. of New York v. Hannay* [1915] 2 KB 536 and *Hannay's* case may be taken as establishing the proposition that the jurisdiction to make a declaration under this Rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action apart from the Rule. In my opinion, the only requirement seems to be that there must be a justiciable issue. In *Lim Cho Hock* case (*supra*) Abdoolcader J (as he then was) said that the "Court's power to make declaratory judgments is confined to matters justiciable in the Courts". In my opinion, the contention of learned Counsel for UEM is misconceived.

In my opinion, UEM is a necessary party to this proceedings because the Courts have always recognized that persons interested who are or may be indirectly prejudiced by a declaration made by the Courts in their absence, should be made parties to the suit (except in very special circumstances) so that UEM may be given the opportunity to be heard in its defence.

Section 29 Of The Government Proceedings Ordinance 1956

It is the submission of the learned Attorney-General that having regard to the clear provision of s. 29(1)(a) of the Government Proceedings Act 1956 Act (hereinafter referred to as the 1956 Act) that no injunction shall be granted against the Government in any civil proceedings by or against the Government, the interlocutory injunction granted by the Supreme Court (Lee Hun Hoe CJ Borneo, Wan suleiman and Wan Hamzah SCJJ) on 25 August 1987 although addressed to UEM was indirectly directed at the Government of Malaysia. The learned Attorney-General argues that what cannot be done directly cannot be done indirectly. The Penang High Court seems to take the view that an interlocutory injunction directed against UEM would be caught by s. 29(1)(a) of the 1956 Act and for this reason, the learned Judge dismissed the *ex parte* application of the respondent. On appeal the Supreme Court disagreed with the construction put to s. 29(1)(a) by the Penang High Court when it decided to grant the interlocutory injunction to the respondent on 25 August 1987. The learned Attorney-General appears to be asking this Court, albeit differently constituted and enlarged, to review and reverse the interpretation of s. 29(1)(a) of the 1956 Act made by the Supreme Court after arguments. For the reasons I have already given above, it is my considered opinion that this Court has no jurisdiction to do what the learned Attorney-General asks. The learned Judge was right in holding that he was bound by the judgment of the Supreme Court on this particular point and I agree with his conclusion.

Conclusion

In my opinion, these appeals are an attempt to persuade this Court, albeit differently constituted and enlarged, to review and reverse the decision made by the Supreme Court (Lee Hum Hoe CJ Borneo, Wan Suleiman and Wan Hamzah SCJJ) on 25 August 1987 after hearing arguments from the learned Senior Federal Counsel representing the Attorney-General, learned Counsel for UEM and the respondent. It is my considered opinion that the jurisdiction of the Supreme Court, whether it sits in a panel of 3, 5 or other odd numbers, is vested with the same jurisdiction and that this Court, has no jurisdiction, express or implied, to review, discharge or vary the judgment of the Supreme Court made on 25 August 1987. In my opinion, the jurisdiction of the supreme Court to review, discharge or vary is contained in s. 44(3) of the Courts of Judicature Act 1964 when it sits to hear an appeal involving an interim order made by a Judge of the Supreme Court under s. 44(1) of the 1964 Act. In my opinion, the power of review is confined to that limited circumstances only. Since the learned Attorney-General is unable to bring his case within the provision of s. 44(3) of the Courts of Judicature Act 1964 this Court should not accede to the request. A *fortiori*, when the Supreme Court was exercising its original discretion entrusted to them by law in granting the interlocutory injunction to the respondent against UEM. For the above reasons, I would dismiss both the appeals.

E. Abdoolcader SCJ (dissenting):

In delivering oral judgment *ex tempore* at the conclusion of argument giving reasons for my decision to dismiss these two joint appeals with costs, I declared at the inception that I was entering a vigorous dissent. It now only remains for me to register and reflect in this judgment the force of my dissent revolving primarily around the crucial question of law as to standing to sue in public law litigation and endeavor in doing so to translate the sting of the thing into language as mild as I can mobilise and muster without mincing words.

First things, first, however, and so to briefly epitomize the factual background of this matter. The respondent, Lim Kit Siang, who assumes a title to sue in several capacities which I will have to advert to presently instituted these proceedings by way of writ against United Engineers (M) Berhad ('UEM') and the Government of Malaysia and two ministers, the Minister of Finance and the Minister of Works, for a declaration that the letter of intent given in December 1986 by the Government in favour of UEM for the privatisation of the North-South Highway is null and void and of no consequence on the basis of allegations of impropriety and misconduct in the award of the tender for this project and statutory corrupt practice which it is not necessary to specify in detail for the purposes of this judgment, and an injunction to restrain UEM from signing the contract for the project with any agent or servant of the Government.

On filing the action in the High Court at Penang and before service of the writ on any of the defendants the respondent applied by *ex parte* summons for an interlocutory injunction against UEM to restrain it from signing the proposed contract pursuant to the letter of intent pending the final determination of the suit. The application was heard as an opposed *ex parte* summons with the State Legal Adviser, Penang, appearing on behalf of the two ministers and the Government before Edgar Joseph Jr. J, who dismissed the application. The respondent appealed to the Supreme Court and although none of the defendants had entered appearance they were served with the record of appeal and were represented by Counsel at the hearing of the appeal. The Supreme Court gave an oral judgment after hearing submissions on 25 August 1987 allowing the appeal and granting the interlocutory injunction sought with costs in the cause and liberty to apply to the Court below, and further directing an early trial of the action before another Judge.

UEM then applied to the High Court to have the injunction granted by the Supreme Court set aside and the suit struck out on the ground that is discloses no reasonable cause of action, is frivolous or vexatious or is otherwise an abuse of the process of the Court, and alternatively in the exercise of its inherent jurisdiction on the ground that the action is not maintainable in law or that the respondent has no *locus standi*. The two ministers also jointly applied by summons to have the suit against them struck out on similar grounds and in addition invoked O. 15 r. 6(2) of the Rules of the High Court 1980 for their dismissal as parties to the suit by the reason of improper or unnecessary joinder for want of any reasonable cause of action against them. The Government as well took out a summons on grounds identical to those of UEM. V.C. George J heard all these three applications and in a reserved judgment delivered on 5 October 1987 dismissed the application by UEM and the Government with costs but allowed that of the two ministers, and holding that they were not necessary parties to the action, struck them out as defendants from the suit with costs. UEM and the Government promptly appealed to the Supreme Court against the dismissal of their respective applications in these two appeals which were heard together on 14 and 15 January 1988.

I should perhaps observe that in the course of argument before us I drew attention to three recent cases - *Regina v. Her Majesty's Treasury, ex parte Smedley* [1985] 1 QB 657, *Gillick v. West Norfolk and Wisbech Area Health Authority & Anor.* [1986] 1 AC 112 and *Regina v. Secretary of State for the Home Department & Anor., ex parte Herbage* [1987] 1 QB 872 which are in my view highly pertinent to the issues raised in this matter, but the all-round reaction appeared to be one of complete lack of acquaintance with these decisions which I shall have to advert to later, but I only mention this at this stage as my reference to these decisions was only met by the appellants in answer to me with purported reliance, as an all purpose smoke-screen to deny their relevance of application here, on the provisions of O. 53 of the English Rules of the Supreme Court 1965 as amended in 1977 and now given statutory force by s. 31 of the English Supreme Court Act 1981, in view of the changes effected by the English O. 53 in its present form.

It is therefore necessary to briefly deal with O. 53 of the English Rules of the Supreme Court. The English O. 53 as it now stands just provides for a modern system of judicial review and is designed to obliterate the need for distinguishing between the various alterative forms of prerogative relief and other powers. It is only a procedural provision for administrative law remedies enabling an omnibus application for judicial review which empowers the Court to give the requisite relief according to the circumstances of the case by way of any of the prerogative orders as well as declaration, injunction and damages, and in the process provides for the standardisation of the different requirements of standing for the several remedies by enacting a general formula of sufficient interest in the matter to which the application for judicial review relates.

The pivotal issue on which the appeals were actually argued and turned is that of *locus standi* or standing to sue. The respondent, like his English counterpart in *ex parte Smedley*, is a man of many parts and perhaps of even more. He launched these proceedings in his capacity as specified in the statement of claim as a Member of Parliament, the Leader of the Opposition in the House of Representatives, a State Assemblyman, a taxpayer, a motorist and a frequent user of highways and roads in the country.

I have given judgment in two cases setting out the relevant precepts relating to standing - in the High Court in *Lim Cho Hock v. Government of the State of Perak & 2 Ors.* [1980] 2 MLJ 148 and in the Federal Court in *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177, and I see no reason to depart from the principles expounded in these two

decisions. The Federal Court approved *Lim Cho Hock* in *Othman Saat* and endorsed (at p. 179) the concept of liberalizing the scope of individual standing, and these two judgments must be read in the light of the continuing development of the doctrine of *locus standi* here and in other jurisdictions. I alluded to the necessity of keeping in tune with the times in the development of the approach to the question of *locus standi* on *Othman Saat* (at p. 179) to this effect: 'Even if the law's pace may be slower than society's march, what with increased and increasing civic-consciousness and appreciation of rights and fundamental values in the citizenry, it must nonetheless strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels.' Liberalization of standing has in varying degrees been proceeding or proposed in other common law jurisdictions as I have shown in these two judgments, and it would be a shame if we were to lag behind.

The imbroglio that has arisen in this matter is the result of the myopic obfuscation of the distinction between public law and private law cases. The appellants contend that the principle that is applicable is that laid down in *Gouriet v. Union of Post Office Workers* [1978] AC 435 and *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 which I have dealt with in *Othman Saat*.

The English Courts no longer worry about *Gouriet*. It has been authoritatively distinguished by the House of Lords in *Regina v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617. The applicant in that case was a company formed to promote the interest of small business. Alleging that its constituents and other nonunionist were pursued without leniency for not paying their taxes, the applicant sought judicial review of a deal that Revenue had struck with printing industry unions whereby certain tax investigations would be dropped in return for union co-operation in securing an end to casual workers evading income tax by using fictitious names. The unions, it was said, were receiving preferential treatment, and *mandamus* and declaratory relief were sought. Lords Diplock, Scarman and Roskill (at pp. 638-639, 649 and 657-658 respectively) distinguished *Gouriet* on the basis that it concerned only private law. The House of Lords held that the Court of Appeal had been wrong, in an application for judicial review, to treat the question of *locus standi* as a threshold issue to be decided in isolation from the legal and factual context of the case; this is where the bifurcation into public law and private law aspects of litigation assumes vital significance in determining the issue. The general conclusion to be drawn from *National Federation* is that the majority thought that the issue of standing should usually be considered along with the merits, as it is now a matter for the Court's discretion - the graver the illegality, the less insistence on showing standing. The minority would abolish standing.

I referred in *Othman Saat* (at p. 179) to *Regina v. Horsham Justices, Ex parte Farquharson & Anor.* [1982] 2 WLR 430 where Lord Denning MR referred (at p. 446) to *National Federation* and Lord Diplock's assertion in that case (at p. 740) of the right of even a single public-spirited taxpayer to bring a matter to the attention of the Court to vindicate the rule of law and get lawful conduct stopped. *National Federation* was supplied in *Regina v. Felixstowe Justices, ex parte Leigh & Anor.* [1987] 1 QB 582 which held that a journalist, or possibly the press through him, as guardian of the public interest in open justice, had a sufficient interest to give him *locus standi* to apply for a declaration that the justices hearing the case were not entitled to withhold their names for security reasons.

Othman Saat was actually involved a private law element as the plaintiff's grievance there

was the denial of his application for the land in question and its grant to the defendant who was the Menteri Besar of the State and other personages in the upper echelon of the administration. In *Lim Cho Hock* I accorded standing to the plaintiff who was a Member of Parliament, a member of the State Assembly and a ratepayer to impugn the appointment of the Menteri Besar of the State as President of the Ipoh Municipal council. In the *Blackburn* cases which I referred to in *Lim Cho Hock* and *Othman Saat*, standing was accorded to the applicant prior to the examination of the merits of the applications on the reasoning that unless the Court in its discretion gave him hearing, then no one would bring the matter to Court.

In *Fitzgerald v. Muldoon* [1976] 2 NZLR 615 which I referred to in *Lim Cho Hock* (at p. 150), standing was granted to an individual to challenge a general administrative order relating to the compulsory universal superannuation scheme merely because he was one of the million compulsory contributors. In *Regina v. Hereford Corporation, ex parte Harrower* [1970] 1 WLR 1424, the Court did not deny standing on a challenge by local business people as ratepayer, but not as electrical contractors, on a complaint that the local authority had not followed proper tendering procedures in letting out a contract for the installation of central heating.

Public-spirited citizens do not seem to have deluged the English Courts with applications for judicial review since National Federation, but there are some noteworthy decisions, *ex parte Smedley* is one of the few recent examples of a citizen's challenge. There, a taxpayer who sought relief by way of *certiorari* and declaration was given standing by the English Court of Appeal to challenge the Treasury's proposal to pay a large sum of money - in excess of £120 million - to subsidize the European Economic Communities' budget without seeking an Appropriation Act, and it did so on the basis that the grounds of challenge were serious, and, it seems, that the amount involved made the threatened illegality serious. The applicant was given standing to challenge the decision affecting spending of public funds on technical grounds which did not question the substance of the spending decision. In the High Court (The Times, 8 December 1984) Woolf J said that he 'would be surprised if a public-spirited citizen was prevented from coming before a Court to prevent an unconstitutional and unauthorised disposal by the government of funds.' In the Court of Appeal Sir John (now Lord) Donaldson MR said (at p. 664) that the applicant sought the assistance of the Court in his capacity as a British taxpayer and elector and (at p. 667) that he agreed with Woolf J, that he would be extremely surprised to find himself obliged to uphold the submission that the applicant had no sufficient interest and therefore no *locus standi*. It is, I think of some importance to refer to and quote in extension what Slade LJ had to say on the question of *locus standi* (at pp. 669-670):

> The speeches of their Lordships in *Regina v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd.* [1982] AC 617 well illustrate that there has been what Lord Roskill described at . 656G-H as a 'change in legal policy,' which has in recent years greatly relaxed the rules as to *locus standi*. Lord Diplock referred at p. 640C to a 'virtual abandonment' of the former restrictive rules as to the *locus standi* of persons seeking prerogative orders against authorities exercising governmental powers. If the Court had taken the view that Mr. Smedley's application was of a frivolous nature, the wide discretion given it by RSC, O. 53 would have enabled it to dispose of it appropriately. There has, however, been no suggestion that it is of this nature. It raises a serious question as to the powers of Her Majesty in Council to make an Order in Council in the form of the draft now before Parliament. The making of any such Order would be likely to be followed automatically by the expenditure by the government of substantial sums from the Consolidated

> Fund in reliance on s. 2 of the European Communities Act 1972. I do not feel much doubt that Mr. Smedley, if only in his capacity as a taxpayer, has sufficient *locus standi* to raise this question by way of an application for judicial review; on the present state of the authorities, I cannot think that any such right of challenge belongs to the Attorney-General alone.

In *Gillick*, the House of Lords allowed a mother of five daughters under the age of 16 to challenge the legality of the government provision of contraceptive advice to females under 16. The mother's standing went unquestioned, although it was accepted that her daughters were unlikely to seek contraceptive advice without her consent. I do not see that the English O. 53 as enacted in its present form makes any distinctive difference to affect the position. It might well be asked what sufficient interest for the purposes of judicial review as enacted in the English O. 53 since 1977 the applicant in *ex parte Smedley* would have had apart from the other many millions of electors and taxpayers in challenging the proposed subsidy to the European Economic Communities' budget without Parliamentary approval, and so too in the case of Victoria Gillick who was given standing although the memorandum on family planning services issued by the Department of Health and Social Security would not in fact have affected her children.

In *Waddell v. Schreyer* [1981] 126 DLR (3d) 431, the British Columbia Supreme Court gave the plaintiff, who sought a declaration that certain orders-in-council were *ultra vires*, standing by virtue of his special interest as a Member of Parliament. An appeal to the British Columbia Court of Appeal was dismissed; [1983] 1 WWR 762, and leave to appeal to the Supreme Court of Canada was refused: [1983] 1 WWR lii. In *Finlay v. Minister of Finance of Canada* [1984] 1 FC 516, the Federal Court of Appeal of Canada allowed a citizen who was neither directly affected nor a taxpayer to challenge the validity of federal and provincial transfer payments under the Canada Assistance Plan. The decision has been upheld by the Supreme Court of *Canada sub nomine Finlay v. Canada* [1986] 2 SCR 607. The Supreme Court decided that the interest of the applicant was too remote or speculative to grant standing under the general requirement that the plaintiff must have a sufficient private or personal interest in the subject matter. The Court went on to hold, however, that in appropriate public law cases, as a matter of judicial discretion, standing might be given to a private individual notwithstanding the fact that a constitutional or Charter of Rights and Freedoms issue was not involved. The Court thus extended the principle laid down in *Thorson v. Attorney-General for Canada* [1975] 1 SCR 138, *Nova Scotia Board of Censors v. McNeil* [1976] 2 SCR 256 (both of which I dealt with in *Lim Cho Hock*) and *Minister of Justice for Canada v. Borowski* [1981] 2 SCR 575 - all three of which involved the requirements for standing in a constitutional case where a party has no direct interest - to the field of administrative law and, in the result, granted standing to Finlay to bring an action for a declaration to challenge the legality of federal cost-sharing arrangements.

The contention of the appellants is that in matters such as that before us it is only the Attorney-General himself moving *suo motu* or by the grant of a *fiat* for a relator action who has the right to challenge and can take action and no other. I would think it would be too much to expect process of this nature involving the ventilation of a public grievance to proceed only through this channel, given even the fortitude the incumbent of the office would presumably be endowed with, in view of the rebound where the complaint is against the Government itself and the Attorney-General is its legal adviser, as it would surely be expected that if the complaint merited action by the Attorney-General or by his *fiat* to a relator, he would himself in the first instance have had the cause of complaint aborted before its overt

manifestation. For the Attorney-General to have to proceed himself or by reaction in such a case would only be a deplorable and intolerable reflection as in the normal course of events such a situation would and should never be allowed to arise, and so the question of a relator action must necessarily remain attractive as a theoretical possibility with no conceivable hope generally for practical purposes of advancing to concrete action beyond that. This appears to be the rationale in granting standing in such circumstances in other jurisdictions and perhaps explains why Slade LJ said in *ex parte Smedley* in the passage I have cited that he could not think that any such right of challenge belongs to the Attorney-General alone.

I am not therefore impressed that the road to relief in regard to public law issues can be travelled only with the permission of the Attorney-General. To deny *locus standi* in the instant proceedings would in my view be a retrograde step in the present stage of development of administrative law and a retreat into antiquity. The merits of the complaint are an entirely different matter, and we are not concerned with the personalities in the picture or whether it is a highway project or the construction of a causeway to the Moon that is involved. The principle that transcends every other consideration must *ex necessitate* be that of not closing the door to the ventilation of a genuine public grievance, and more particularly so where the disbursement of public funds is in issue, subject always of course to a judicial discretion to preclude the phantom busybody or ghostly intermeddler.

The effect of the denial of standing in such circumstances would be, and it has indeed been so suggested, that we will have to fold our arms and do nothing, in which event I would add we might also as well have to hang our heads in sorrow and perhaps even in mortification in not being able to at least entertain for consideration on its merits any legitimate complaint of a public grievance or alleged unconstitutional conduct. To take an instance: If a considerable sum of money is taken out by executive *fiat* from the Consolidated Fund without Parliamentary approval by way of a Supply Act for the implementation of a project, however laudable, the legality of such a move would then be incapable of being tested or challenged by a public spirited citizen or a taxpayer as in *ex parte Smedley* and *Finlay v. Canada*. The Courts must therefore be cautious in accepting any postulate that purports to narrow the rights of recourse to them and, in the present context, in constricting the concept of standing in public law litigation, and will have to be ready to sharpen their constitutional knives as and when the occasion demands.

The question of *locus standi*, which the notes of proceedings disclose was raised for the first time in the present proceedings by Mr. Zaid Ibrahim appearing for UEM in this matter in the course of the hearing of the appeal before the supreme Court on 25 August 1987 and pursued by Senior Federal Counsel appearing for the Government, appears to have been fully exposed in argument, as the Court in arriving at its decision in a short judgment owing to the urgency of the matter stated it had considered a number of authorities, both English and local, as to the question of *locus standi* and that it need only say that on the facts of this case the respondent clearly has *locus standi* to bring the instant suit. We are now met with the preposterous contention that this judgment of the Supreme Court is only *obiter* and made *per incuriam* just because it does not set out full reasons for its decision. The pronouncement on 25 August 1987 is a judgment of the Supreme Court which unequivocally made a decision on the points in issue before it including that of standing taken by the appellants themselves and crucial to the substratum and basis of the respondent's suit. Any view to the contrary as to the efficacy of that judgment would lay open the door to similar contentions in relation to decisions of this Court and indeed of other Courts as well in matters where brief oral judgments are delivered at the conclusion of argument.

I must categorically state that the proposition advanced that what the Supreme Court said is *obiter* is wholly beyond intelligible comprehension, as the Court specifically decided the point of standing raised and put in issue affecting the very foundation of the suit instituted. And as to the decision being *per incuriam*, I would suggest that before any argument on this line is ever to be raised, it would be highly instructive to first refer to the latest observation in this regard by Sir John (now Lord) Donaldson MR in the English Court of Appeal in *Duke v. Reliance Systems Ltd.* [1987] 2 WLR 1225 (at p. 1228):

> I have always understood that the doctrine of *per incuriam* only applies where another division of this Court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the Court had this material, it **must** have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it **might** have reached a different conclusion. That appears to me to be the position at which we have arrived today.

'*Per incuriam*' is only Latin for 'through want of care' or 'through in advertence' or 'by mistake'. I have not been told or shown how or when or where any such forensic mishap occurred in the judgment of this Court delivered on 25 August 1987.

To reverse that decision of the Supreme Court on *locus standi* now would amount to no less than our sitting in judgment on another division of this Court and overruling its adjudication given only some four and a half months ago. The Supreme Court which can aptly be described and designated as the engine-room of the Constitution would as a result have the sanctity of its decisions set at stake. In *Lye Thai Sang & Anor. v. Faber Merlin (M) Sdn. Bhd. & Ors.* [1985] CLJ (Rep) 196, this Court held in a judgment delivered by Tan Sri Abdul Hamid CJ Malaya, that where an appeal has been heard and disposed of by the Supreme Court, the Court has no power to review the case, that is, to re-open, rehear and re-examine its decision for whatever purpose. It now becomes a matter of speculation whether that decision itself has been the subject of review by this Court as a result of the decision of the majority of this Bench in the instant appeals. I must point out that only a constitutional amendment can confer jurisdiction and effectuate the power of review by the Supreme Court of its own decisions.

V.C. George J, in consonance with the doctrine of *stare decisis* and judicial discipline was accordingly bound by the decision of the Supreme Court given on 25 August 1987, as he properly held, and, I would add, he also examined the position as to *locus standi* in law independently by extensive reference to authority and correctly came to the same conclusion.

To discard the decision of the Supreme Court given previously and so very recently in the same matter and on the same point and summarily dismiss it as the appellants would have us do would only inject alarming uncertainty into the law, with however the consoling thought but perhaps as an unintended consequence that just as the majority judgment in this matter has purported to reverse the decision of this Court given on 25 August 1987, so would it pave the way for yet another division of this Court to reconsider the question in issue in some other subsequent case perhaps in the not too distinct future and come to a different conclusion and restore the principle of law accepted in the decision reversed. The result of all this would well be, adapting my words in *Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors.* [1985] CLJ (Rep) 122 (at p. 128), to countenance in the realm of judicial precedent a free-for-all like the aftermath of an English football match. Well then did Francis Bacon have cause to muse as he did, and that too as far back as 1605: "It is of so much importance to a law, that it be certain, that without this, neither can it be just, 'for if the

trumpet give an uncertain voice, who shall equip himself for war?' Similarly, if the law given an uncertain voice, who shall prepare himself to obey? Therefore, it is necessary that it warn before it strike."

I must touch on one other matter in this regard. Tan Sri Abdul Hamid CJ (Malaya), in delivering his judgment says that perhaps the time has come to review the decision of the Federal Court in *Othman Saat*, and that the Supreme Court is not bound by decisions of the Federal Court. I am not aware of nor do I subscribe to any such theory on the doctrine of *stare decisis* in our Court in relation to decisions of the Federal Court. The Supreme Court is but the Federal Court reconstituted under a different name with enhanced jurisdiction, and until a policy in relation to judicial precedent has been agreed, formulated and declared by the Judges of the Supreme Court as a collegiate body, as indeed the High Court of Australia has done in *Viro v. Regina* [1978] 141 CLR 88 and *Jones v. The Commonwealth* [1987] 61 ALJR 348 after appeals to the Privy Council ceased, I would have thought that the principles enunciated in *Young v. Bristol Aeroplane Company Limited* [1944] KB 718; [1946] ac 163 (at p. 169) would apply. As for *Othman Saat*, speaking for myself I can see no reason for any review of that decision of the Federal Court, and the call so made would appear to be all the more surprising as there has been no such suggestion by the appellants, and this would seem to echo the shades of the *Spycatcher* Case (*Attorney-General v. Guardian Newspapers Ltd. & Ors.* [1987] 1 WLR 1248) when the House of Lords in a 3-2 majority judgment affirming the decision of the Court of Appeal with an extended order went entirely outside the submissions made and widened the scope of the injunction granted by restricting publication of the proceedings pending before the supreme Court of New South Wales without any request for an order to this effect by the Attorney-General.

I now turn to the matter of a cause of action against the appellants. The question raised of the absence of any cause of action is in my view nothing more than a large red herring, perhaps covered with a thick white sauce, but in all its stark reality a large red herring nevertheless. The action instituted by the respondent is for a declaration under O. 15 r. 16 of the Rules of the High Court, and no cause of action is necessary in such a case. The reliance placed on s. 41 of the Specific Relief Act 1950 is wholly misconceived and misplaced. *Othman Saat* (at p. 178) has made it clear that s. 41 of that Act is not exhaustive of declaratory relief, and a declaration can be sought and made under **O. 15 r. 16** as in this case in which event it is not necessary to show a present cause of action.

The plaintiff may, in a case of tort, be asserting that he has title to some property, for example, in a slander of title case. In *Loudon v. Ryder (No. 2)* [1953] Ch 423, neither damages nor an injunction could be awarded, for the defendant lacked malice, but a declaration of the plaintiff's title was made since the defendant was persisting in his false assertions. In short, the plaintiff need not have a cause of action. The reasoning in this decision was approved in *RJ Reuter Co. Ltd. v. Mulhens* [1954] Ch 1950 and *Kingdom of Spain v. Christie, Manson & Woods Ltd.* [1986] 1 WLR 1120 (at p. 1127-1128).

As *Dyson v. Attorney-General* [1911] 1 KB 410 said that O. 25 r. 5 (which was the precursor of O. 15 r. 16) could be used even where no consequential relief could be granted, it impliedly ruled that it is permissible to sue for a declaration in the absence of a cause of action. This was expressly stated to be the position in *Guaranty Trust company of New York v. Hannay & Company* [1915] 2 KB 536 which held that the Court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant. In *Rediffusion (HongKong) Ltd. v. Attorney-General of Hong Kong* [1970] AC 1136, the Privy Council summed up the present position (at p. 1167) as follows:

> There may be circumstances under which a person may have the right to go to a Court for a declaration (whether or not he seeks other relief) without being able to or having to show that he has a cause of action apart from his claim for a declaration. His application will not be defeated because he applies merely for a declaratory judgment or order. His application for a declaration of his right is not to be refused merely because he cannot establish a legal cause of action: *Guaranty Trust Company of New York v. Hannay & Co.* [1915] 2 KB 536. As Banker LJ said in that case there would be the limitation that the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction.

I would also observe that I am unable to see the relevance of s. 6 of the Specific Relief act raised by the Attorney-General in argument. That provision prohibits the granting of specific relief for the mere purpose of enforcing a penal law, but no such question arises here. The point taken, that it is not for the respondent to arrogate to himself the matter of alleging criminal misconduct and that this is a matter solely for the Attorney-General as the Public Prosecutor, involves the fallacy of *petitio principii* as the primary issue is that of standing and not the consideration of the substantive question involving the relevance and merits of the allegations. The respondent is not asking in these proceedings for a *mandamus* or a mandatory injunction against the Attorney-General as Public Prosecutor to take criminal action in the matter.

I find equally irrelevant the Attorney-General's reliance on s. 7 of the Government Proceedings Ordinance 1956 which provides for savings of acts done in exercise of public duties. I will not set out that section *in extenso* to obviate prolixity, and it will suffice for me to say that I cannot see how that provision can help, as all it does is to preclude proceedings against the Government on account of anything done or omitted or refused to be done by the Government or any public officer in 'exercise of the public duties' of the Government, with the expression which I have put in quotes defined in sub-section (2) of that section to include para. (a) thereof which is the only relevant part in the present context and which reads: 'the constructing, maintenance, diversion and abandonment of railways, roads, bridle-paths or bridges'. This must necessarily mean that the Government is rendered immune from action in the execution of any such works by reason of any loss or damage suffered thereby by any person as a result of, for instance, the diversion or construction of a highway or road affecting his business or residence or otherwise with economic or other consequences. Sub-section (3) substantiates this position as it specifically permits an action for damages or compensation arising out of negligence or trespass in the execution of any such works. Section 7 of the Ordinance cannot in my view conceivably appertain to a complaint of the nature made in the present proceedings involving a challenge to a decision affecting the expenditure of public funds in relating to a project for the construction of a highway on the modus of its implementation which does not question the substance of the expenditure or the execution of the project itself. The respondent's action does not accordingly in any way affect the exercise of the public duties of the Government within the purview of s. 7 of the Ordinance.

I advert now to the interlocutory injunction granted against UEM. It is argued that no injunction can issue against the Government by virtue of the provisions of s. 29 of the Government Proceedings Ordinance and so the issue of an injunction against UEM in effect amounts to a devious device to circumvent that statutory prohibition. In the course of argument on this issue, I raised a query in relation to the provisions of s. 29, and when I referred in this regard to *ex parte Herbage*, this decision seemed to be about as familiar generally as the identity of the Unknown Warrior. The effect of s. 29, briefly put, is to debar the grant of an injunction against the Government or its officers in any civil proceedings by or against the Government. The term 'civil proceedings' is defined in s. 2(2) of the Ordinance

to mean any proceeding whatsoever of a civil nature before a Court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding, but does not include proceedings under Chapter VIII of the Specific Relief Act 1950, **or such proceedings as would in England be brought on the Crown side of the Queen's Bench Division**. In England all the remedies for the infringement of rights protected by public law including declarations and injunctions must now be applied for by way of an application for judicial review under the English O. 53 (*O'Reilly v. Mackman* [1983] 2 AC 237), and this is brought on the Crown side of the Queen's Bench Division. The requisite provisions in the Ordinance I have referred to reproduce textually *totidem verbis* the equipollent provisions in the British Crown Proceedings Act 1947, namely, s. 21 and 38(2) thereof.

In *ex parte Herbage*, applicant was remanded in custody awaiting his extradition to the United States of America. He complained that he was being detained under inhumane conditions and he applied for judicial review and either an order of *mandamus* or a mandatory injunction directed against the Secretary of State and the prison governor in terms that would ensure that he was detained under humane conditions and not in solitary confinement. On the applicant seeking an interim injunction directing the Secretary of State and the prison governor to take all necessary steps to ensure that he was granted the same opportunities of association with other prisoners as were accorded to prisoners on remand, it was held that although s. 21(2) of the Crown Proceedings Act had been construed as prohibiting the grant of an injunction against an officer of the Crown in civil proceedings, the subsection was not applicable to proceedings on the Crown side of the Queen's Bench Division and did not affect the jurisdiction of the Court to grant prerogative orders against officers of the Crown, and as the provisions of the English O. 53 since reinforced by s. 31 of the English Supreme Court Act 1981 gave the Court power to grant injunctive and interim relief in proceedings for judicial review, the Court now had jurisdiction to grant an interim injunction against an officer of the Crown on an application for judicial review.

The only answer that could be advanced to the point I raised in this regard with reference to the relevant provisions of the Government Proceedings Ordinance and *ex parte Herbage* was that this case did not apply in view of the English O. 53 and that the exception in the definition of 'civil proceedings in s. 2(2) of the Ordinance referred to the position as it stood in 1956 when the Ordinance was enacted and was not affected by the changes brought about to the English O. 53 in 1977. It is therefore necessary to examine the substance or the lack of it in this proposition.

A statute is to be treated as always speaking. In its application on any date, its language, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law. The formula of exclusion from the definition of 'civil proceedings' in s. 2(2) of the Ordinance of 'such proceedings **as would in England be brought** on the Crown side of the Queen's Bench Division' clearly shows in my view that it is intended to develop in meaning with evolving circumstances and is accordingly what may be termed an on-going statutory provision unlike one that is intended to be of unchanging effect or a fixed-time provision. The general presumption is that the legislature intends the Courts to apply to an ongoing statute a construction that continuously updates its wording to allow for changes since the statute was initially framed. The assumption that is adopted by the Courts is summarised in the expression an Act is deemed to be always speaking', that is to say, words in an Act are to be interpreted in accordance with their current meaning.

This approach is of relatively recent origin, as previously statues were generally construed in accordance with their natural meaning as at the date of their enactment. This rule was

ossified in the maxim '*Contemporanea expositio est optima et fortissima in lege*' (the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up). It is clear now, however, that the operation of this rule in its fullest extent has been abandoned except perhaps in the construction of ambiguous language used in very old statutes where the law itself may have had a rather different meaning; *Campbell College, Belfast (Governors) v. Commissioner of Valuation for Northern Ireland* [1964] 1 WLR 912 (at p. 941 per Lord Upjohn). In considering a modern statute *'contemporanea expositio'* is of no value, and the Courts have refused to apply it to statutes passed within the last hundred years (*Trustees of Clyde Navigation v. Laird* [1883] 8 AC 658 (at p. 673; *Assheton Smith v. Owen* [1906] 1 Ch 179 (at p. 213)). It follows that legal references in an enactment must be updated to allow for change, and instances of this are *PoleCarew v. Craddock* [1920] 3 KB 109 where 'tax' in a pre-income tax enactment was held to include income tax, and *Attorney-General v. The Edison Telephone Company of London* [1880] 6 QBD 244 which held a telephone to be a 'telegraph' within the meaning of the Telegraphs Act 1863 and 1869, although the telephone was not invented or contemplated in 1869.

It would therefore appear that on the wording of the relevant provisions in the Government Proceedings Ordinance and the exclusion from the provisions precluding injunctive relief against the Government or its officers of such proceedings as would in England be brought on the Crown side of the Queen's Bench Division and the current position in England in that respect in relation to proceedings in public law litigation, an injunction in the instant proceedings against the Government is not precluded by the provisions of s. 29 of the Ordinance.

Even if, however, s. 29 of the Ordinance is effective to prohibit an injunction against the Government or any of its officers, and I have come to the conclusion that it is not in the light of the statutory provisions I have adumbrated, I can see no impediment to the granting of an interlocutory injunction against UEM in this case. The inability to proceed against the Government, if at all, does not of necessity *per se* preclude the grant of injunctive relief against UEM as the transaction sought to be impugned is synallagmatic in nature and not unilateral, and the affidavits disclose contentions as to the solvency of UEM and other matters as well involving it in respect of which the High Court has found they were in fact serious questions to be tried.

Anent the matter of the interlocutory injunction granted against UEM, the Attorney-General also seeks to rely on the provisions of s. 54(d) and (k) of the Specific Relief act which provide respectively that an injunction cannot be granted to interfere with the public duties of any Government in Malaysia, or with the sovereign acts of a foreign Government (para. (d)), and where the applicant has no personal interest in the matter (para. (k)). I cannot see how they apply to affect the position in the matter before us. There is no question of any interference with the public duties of the Government as what is sought is to question the propriety of the transaction between the Government and UEM involving the expenditure of public moneys on the basis of certain allegations raised in respect thereto; the respondent does not seek to question the substance of the spending decision or the propriety of the North-South Highway project itself. In any event, whether or not there can conceivably be any question of interference with the public duties of the Government is a matter for determination after consideration of the merits at the hearing, and these proceedings have not as yet reached that stage. As for para. (k), the question of whether the respondent has any personal interest or not in the matter must depend on the postulate of standing and I need not belabor this point as I have dealt with it at some length, and if the respondent can have standing to

institute these proceedings as a public-spirited citizen, Leader of the Opposition, Member of Parliament and taxpayer, then he must necessarily and certainly have a personal interest in the matter in consequence on that basis.

And quite apart from all this, I would point that s. 54 of the Specific Relief Act comes under Chapter X of the Act dealing with perpetual injunctions, and s. 51 of the Act which comes under Chapter IX and refers to injunctions generally draws a distinction between temporary injunctions and perpetual injunctions, specifically enacting that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. The injunction sought and granted in this case was interlocutory pending the final determination of the suit.

V.C. George J, in the High Court carefully and meticulously examined in a well-considered and logically explicit judgment all the points raised and in issue before refusing to discharge the interlocutory injunction granted by the Supreme Court on 25 August 1987. It has been said time and again that the discretion whether or not to grant an interlocutory injunction is vested at first instance and not in the appellate Court whose function initially is one of review only, and it will not overrule the decision of the Judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the Judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate Court would have exercised the discretion differently, and I would refer to the judgment of the Federal Court in this regard is *S & F International Limited v. Trans-Con Engineering Sdn. Bhd.* [1985] 1 MLJ 62 (at p. 64). I can see no error of any kind in the judgment of V.C. George J warranting interference by us.

In the premises and for the reasons I have discussed, I said at the conclusion of argument I would dismiss these appeals with costs.

One redeeming feature in this matter is that each party was ordered to bear its own costs here and below when the appeals were allowed as a result of the judgment of the majority of this Bench. This at least shows in relation to the issue of *locus standi* that the respondent was not all that wrong in purporting to assume the right in the capacities he specifies to institute these proceedings.

As a postlude, I would add this. If this judgment reads in *toto aut in paribus* like an indictment, let me immediately say it is meant to-against the doctrine of retrogression in the field of public law litigation in this age and at this stage of its evolution.

It might not perhaps be inapposite to close by referring to the dissent of Khanna J, in the Supreme Court of India in the famous *Habeas Corpus* Case (*Additional District Magistrate, Jabalpur v. Shivakant Shukla* AIR [1976] SC 1207) when he concluded his judgment (at p. 1277) with these words:

> As observed by Chief Justice Hughes, Judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice. A dissent in a Court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Judge believes the Court to have been betrayed.

Also found at [1988] 1 CLJ 219